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## The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief

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## **The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief**

TRACY A. THOMAS<sup>†</sup>

### TABLE OF CONTENTS

Introduction .....	302
I. The Distinctive Character of Prophylactic Relief .....	312
A. Prophylaxis as a Subset of Injunctive Relief .....	314
B. The Specific Measures Directing Affiliated Legal Conduct .....	322
C. The Limited Reach of Prophylactic Relief .....	330
1. Targeting the Legal Harm .....	332
2. Sufficient Causal Nexus .....	339
II. Judicial Discretion and the Choice of Prophylactic Relief .....	352
A. Prophylaxis as the Least Restrictive Alternative .....	353
B. Crafting Prophylaxis in the Remedial Decisionmaking Process .....	362
III. The Necessity of Prophylactic Remedies .....	370
A. Definitional Need to Translate Abstract Rights .....	372
B. Functional Need to Implement Rights .....	379
Conclusion .....	384

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## INTRODUCTION

This Article provides a descriptive and normative exploration of the prophylactic remedy. The *prophylactic remedy* imposes specific measures directing defendant's legal conduct affiliated with the proven wrong to prevent future harm.<sup>1</sup> Federal courts have utilized prophylactic remedies for over forty years.<sup>2</sup> Prophylaxis has become the remedy of choice for violations of intangible rights protecting constitutional, personal, and community values because of its effectiveness in preventing harm that is otherwise difficult to redress.<sup>3</sup> However, prophylactic remedies remain amorphous, unknown concepts in the eyes of most lawyers and academics. Few legal treatises or casebooks mention prophylaxis, and those that do obfuscate rather than clarify the understanding of prophylaxis.<sup>4</sup> The Supreme Court has often endorsed prophylactic remedial decrees, yet as in the

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1. See ELAINE W. SHOBNEN & WILLIAM MURRAY TABB, REMEDIES: CASES AND PROBLEMS 246 (2d ed. 1995); Tracy A. Thomas, *Understanding Prophylactic Remedies Through the Looking Glass of Bush v. Gore*, 11 WM. & MARY BILL RTS. J. 343, 344-45 (2002) [hereinafter *Prophylactic Remedies*].

2. The first example of the imposition of a remedy of prophylactic character was in 1963 in *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963). There the Supreme Court upheld a preliminary, prophylactic injunction to prevent securities fraud requiring an investment advisor to disclose to his clients his own personal dealings in securities recommended to the clients. *Id.* at 193; see also *Dickerson v. United States*, 530 U.S. 428, 457 (2000) (Scalia, J., dissenting) ("Indeed, the United States argues that '[p]rophylactic rules are now and have been for many years a feature of this Court's constitutional adjudication.' That statement is not wholly inaccurate, if by 'many years' one means since the mid-1960's.") (alteration in the original) (citing Brief for the United States at 47); Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 926 (1999) ("My review of the case law reveals a long history of judicial creation of prophylactic rules, but a lack of self-conscious judicial examination of their legitimacy.").

3. See, e.g., *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994) (upholding prophylactic remedy in abortion protest case); *Women Prisoners v. D.C. Dep't of Corrs.*, 877 F. Supp. 634 (D.D.C. 1994) (imposing extensive prophylactic remedies to address inequality, sexual harassment, and unconstitutional conditions in women's prisoners). See also cases discussed *infra* pp. 121-22, 170-74 and accompanying text; Landsberg, *supra* note 2, at 930 (noting that "prophylactic rules have become increasingly popular with the judicial" branch because they provide a maximal remedy, effectively achieve the desired result, and simply enforcement of constitutional values).

4. See DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 282-89 (3d ed. 2002); DAVID SCHOENBROD ET AL., REMEDIES: PUBLIC AND PRIVATE 131-34 (3d ed. 2002); SHOBNEN & TABB, *supra* note 1, at 246.

case of most remedial decisions, has omitted explanation of the principles, parameters, and theoretical justifications for the equitable remedy.<sup>5</sup>

This Article attempts to fill this theoretical and doctrinal void. The primary aim of the Article is to enable courts, lawyers, and scholars to understand the reality of the prophylactic remedies that are available and frequently ordered against defendants. The second, more ambitious goal of this Article, is to create the doctrinal and theoretical basis to dispel the prevailing belief that prophylaxis is merely the arbitrary, personal activism of the individual judge.<sup>6</sup>

The existing construct of prophylaxis dominating the scholarship is one of unprincipled judicial activism.<sup>7</sup> Prophylaxis has been conceptualized by its opponents,<sup>8</sup> as well

5. In addition, only a few scholarly articles have addressed the principles or doctrinal parameters of a prophylactic remedy in the forty years since its inception. See Landsberg, *supra* note 2, at 926-27 (discussing judicial prophylactic "rules" not directly sanctioned or required by the Constitution that are adopted to ensure that the government follows constitutionally required rules); David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 671-82 (1988) (discussing the court's ability to give more than the plaintiff's rightful position through prophylactic relief when necessary to remedy the violation).

6. See *Missouri v. Jenkins*, 515 U.S. 70, 133 (1995) (Thomas, J., concurring) ("I believe that we must impose more precise standards and guidelines on the federal equitable power, not only to restore predictability to the law and reduce judicial discretion, but also to ensure that constitutional remedies are actually targeted toward those who have been injured."); Schoenbrod, *supra* note 5, at 629-30 ("Without principles to guide the exercise of equitable discretion, the judge acts as a policy maker in framing the remedy, which throws into question the legitimacy of the judicial power to grant [prophylactic remedies].").

7. See generally Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985) (arguing that prophylactic rules in the criminal and constitutional context are illegitimate exercises of judicial power); John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121 (1996) (constituting the classic modern work arguing that structural and prophylactic injunctions violate principles of judicial restraint).

8. See *Dickerson v. United States*, 530 U.S. 428, 465 (2000) (Scalia, J., dissenting) (criticizing the imposition of a "Court-made code" upon Congress and the States); *North Carolina v. Pearce*, 395 U.S. 711, 741 (1969) (Black, J., concurring in part and dissenting in part) (criticizing prophylactic rule of case as "pure legislation if there ever was legislation"); cf. WILLIAM LASSER, *THE LIMITS OF JUDICIAL POWER: THE SUPREME COURT IN AMERICAN POLITICS* 222-43 (1988) (describing former Attorney General Edwin Meese's criticism of the modern Court as being "in the habit of deciding cases based upon what they think 'constitutes sound public policy,' rather than on 'a deference to what the

as by some proponents,<sup>9</sup> as judicial policymaking or law-making by which the judge in public law litigation accomplishes the "social good" of preserving constitutional values by imposing her own views upon the defendant.<sup>10</sup> Even the first academics to endorse prophylaxis in concept, if not by name, adopted the judicial activism construct to describe the types of injunctive remedies emerging from the courts.<sup>11</sup> However, this notion of judges as dictators of social policy and the managers of governmental institutions raises institutional concerns of separation of powers and federalism.<sup>12</sup>

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Constitution—its text and intention—may demand.” (quoting Elder Witt, *A Different Justice: Reagan and the Supreme Court*, CONG. Q. 176 (1986)); Alfred M. Mamlet, *Reconsideration of Separation of Powers and the Bargaining Game: Limiting the Policy Discretion of Judges and Plaintiffs in Institutional Suits*, 33 EMORY L. J. 685, 685-86 (1985) (arguing that courts’ issuance of affirmative injunctions addressing subsidiary policy problems related to the legal violation is an exercise of legislative or executive discretion which belongs to majoritarian bodies).

9. See MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* 1-25 (1998) (arguing that judges do and should engage in judicial policy making and describing such policy making in the context of prison reform litigation); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979) [hereinafter *Justice*]; Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2011 (1997). *But see* Schoenbrod, *supra* note 5, at 671 (disagreeing that judges engage in extra-judicial policy making when imposing prophylactic relief).

10. See FEELEY & RUBIN, *supra* note 9, at 5 (“Policy making, by a judge or anyone else, is the process by which officials exercise power on the basis of their judgment that their actions will produce socially desirable results . . . [while] interpretation . . . is the process by which public officials exercise power on the basis of a preexisting legal source that they regard as authoritative.”).

11. See Chayes, *supra* note 9; *Justice*, *supra* note 9.

12. See Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978); Thomas, *Prophylactic Remedies*, *supra* note 1, at 362-64 (summarizing the institutional criticisms of prophylactic relief); cf. Colin Diver, *The Judge as Political Powerbroker*, 65 VA. L. REV. 43, 89 (1979) (“Nevertheless, despite the ease with which we may view the judge as occasional social policymaker or community conscience, the prospect of a judge intervening actively in governmental politics offends cherished images of the judicial function. The role of powerbroker implies a degree of partisanship, manipulation, and guesswork offensive to accepted judicial virtues of neutrality, passivity, and objectivity. Moreover, it sanctions a degree of judicial intrusion into the political process that conflicts sharply with values inherent in federalism and separation of powers.”); Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1142-43 (2002) (defining judicial activism as a concern over the institutional role of the judge in

Commentators have attacked the competency and legitimacy of courts to impose prophylactic measures that create new legal obligations of public import outside the democratic process of the legislature.<sup>13</sup>

This Article disagrees with the argument that remedial decisionmaking is policymaking somehow different from the accepted authority of the court to make decisions about fact or law, and therefore illegitimate.<sup>14</sup> Other commentators as well have concluded that prophylactic remedies are a legitimate use of the judicial power.<sup>15</sup> The point of this Article,

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relation to other actors in the system). The separation of powers concerns are that in imposing prophylactic relief the court oversteps its Article III authority to decide cases only by engaging in policymaking extrinsic to the litigation and in so doing displaces the legislature's designated and more appropriate expertise in policymaking through a democratic forum. See *Dickerson v. United States*, 530 U.S. 428, 454 (2000) (Scalia, J., dissenting) (arguing adoption of prophylactic rules "flagrantly offends fundamental principles of separation of powers, and arrogates to [the Court] prerogatives reserved to the representatives of the people"). The federalism concerns arise out of the picture of the federal court directing the conduct of state institutions through injunctive commands. See *Dickerson*, 530 U.S. at 454 (Scalia, J., dissenting); *Lewis v. Casey*, 518 U.S. 343, 384-88 (1996) (Thomas, J., concurring); *Missouri v. Jenkins*, 515 U.S. 70, 114 (1995) (Thomas, J., dissenting).

13. See JOSEPH D. GRANO, *CONFESSIONS, TRUTH, AND THE LAW* 173-98 (1993) (attacking legitimacy of the prophylactic rule of *Miranda*); LASSER, *supra* note 8, at 222-26; Grano, *supra* note 7, at 105; Nagel, *supra* note 12, at 661; Thomas Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1127-29 (1978) (suggesting that prophylactic rulemaking invades congressional power to legislate and executive powers to define law enforcement methods and violates federal judicial power to displace state law); Yoo, *supra* note 7, at 1151-70. But see Thomas, *Prophylactic Remedies*, *supra* note 1, at 374-80 (arguing that prophylaxis is a legitimate exercise of the federal judiciary's Article III power); accord Landsberg, *supra* note 2, at 926.

14. See Honorable William Wayne Justice, *The Two Faces of Judicial Activism*, Address at the George Washington University National Law Center (Mar. 10, 1992), in 61 GEO. WASH. L. REV. 1, 7-8 (1992) ("The propriety of a detailed remedy comes from the judicial office itself. The Supreme Court has said, time and again, that once a constitutional violation is found, a federal court is required to tailor the scope of the remedy to fit the nature and extent of the injury. Similar to its duty to say what the law is, a court's obligation to ensure full compliance with the law is nothing new.") [hereinafter Justice Speech]; Thomas, *Prophylactic Remedies*, *supra* note 1, at 360-80.

15. See Evan H. Caminker, *Miranda and Some Puzzles of "Prophylactic" Rules*, 70 U. CIN. L. REV. 1, 2 (2002); Landsberg, *supra* note 2, at 949-63 (arguing the prophylactic rules, including prophylactic injunctions, are supported by the general *Marbury* power and the "nature of our constitution [and] the nature of courts"); Henry Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3 (1975) (finding judicial authority for prophylactic rules in constitutional cases from the "constitutional common law" comprised of

however, is to reveal the inaccuracy of the assumptions about prophylaxis upon which these criticisms are based. Revealing the inaccuracy of the foundational assumptions supporting these politicized criticisms of public law injunctions begins to erode the existing academic and political bias against such commonly-used judicial remedies. The launching points for the attacks on the legitimacy of prophylactic relief are the allegations that the judicial response is unprincipled, unpredictable, and unconstrained by the rule of law.<sup>16</sup> None of these allegations prove true. To the contrary, this Article's review of prophylaxis and the way in which it has been utilized by judges of all political stripes for nearly half a century demonstrates that prophylaxis operates under precise doctrinal principles formulating consistent standards by which it is cautiously imposed when necessary.<sup>17</sup>

The existing case law reveals common trans-substantive remedial principles guiding the courts in their choice of prophylaxis and unified theories supporting the legitimacy

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a series of remedial rules drawing their inspiration and authority from various constitutional provisions); Schoenbrod, *supra* note 5, at 671; David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988) (arguing that prophylactic "rules" are not exceptional measures of questionable legitimacy but are a central and necessary feature of constitutional law); cf. Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 71, 73 n.47 (stating there is consensus that prophylaxis is legitimate and the reason is no longer important).

16. See LASSER, *supra* note 8, at 222-26.

17. Cf. FEELEY & RUBIN, *supra* note 9, at 19 ("The prison cases represented the collective actions of literally hundreds of federal judges, acting individually. These judges were not fire-breathing radicals, or the minions of an occupying foreign power; they were not captured by some narrow special interest group, nor did they meet in secret conclave to concoct their plans. They were middle-of-the-road, upper-middle-class Americans, largely white and male, appointed by Republican and Democratic presidents. They did not even take their cues from the Supreme Court, the usual villain for critics of judicial activism . . . . There was no *Brown*, *Miranda*, or *Roe v. Wade* to generate a sudden shift in doctrine and provide the explanation that a few idiosyncratic individuals had exercised their will . . . . If these cases represented such a wholesale violation of true principles for constraining judicial behavior, why were so many federal judges willing to decide them, and with such apparent unanimity? . . . . Although much of this literature has merit [challenging public remedies as violative of separation of powers], its frequent conclusion that the federal judges overstepped their authority is somewhat implausible. It is implausible that so large a group of government officials, in so many different regions, acting independently of one another over such an extended period of time, would stray so far from the accepted path.").

of the remedy.<sup>18</sup> Discerning these core principles and rules for prophylactic relief demonstrates, perhaps for the first time, that a common remedy with overarching remedial rules is at play in each of these cases of prophylaxis. The establishment of trans-substantive remedial principles has been one of the key goals of modern remedies scholarship as the law of remedies has been too often compartmentalized as specific rules limited by the nature of the claim.<sup>19</sup> This holdover from the English common law writ system, in which right and remedy were intertwined in the particular writ requested, has delayed the development of an advanced understanding of the law of remedies.<sup>20</sup> For what has become apparent is that there are in fact common remedial rules that apply in all cases just as there are common procedural rules that apply regardless of the nature of the

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18. The principles that emerge are trans-substantive in the sense that they transcend the particular substantive type of claim at issue in the case and instead apply equally to all cases involving the application of prophylactic relief. As Professor Schoenbrod has noted, "the transsubstantive principles of remedies are sometimes not well stated in the case law or recognized in the various research aids that lawyers use. This makes it particularly difficult for lawyers who have not studied remedies or who have done so in a 'cookbook' fashion to locate or apply the law that they need to help their clients. They are unable, for instance, to deal with a novel remedies question by drawing appropriate analogies to remedies from other substantive areas of the law." SCHOENBROD, *supra* note 4, at 3. However, the Supreme Court's approach to public law remedies is generally transsubstantive, as principles applied in one area are applied in other contexts as well. Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L. J. 475, 507 (1999).

19. See Schoenbrod, *supra* note 5, at 631-32. For discussions of the trans-substantive tradition in remedies literature, see SCHOENBROD, *supra* note 4, at 3 ("[R]emedies—like civil procedure, administrative law, evidence, or conflicts of law—is 'transsubstantive': the problems it addresses arise in all substantive areas of law. Although the substantive law affects how remedies issues are resolved, just as the substantive law affects the outcome of procedural or evidentiary questions, this issues themselves are universal."); see also DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* (1991); Gene Shreve, *The Premature Burial of the Irreparable Injury Rule*, 70 TEX. L. REV. 1063, 1070 (1992) (reviewing Laycock's article favorably with respect to its assertion of trans-substantive rules of remedies).

20. See Dean Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 26-27 (1905) (calling compartmentalization on injunctive relief "the decadence of equity" because the purpose of equity's flexibility gets lost in subject-specific rules); Schoenbrod, *supra* note 5, at 632, 654 (arguing that recognition of trans-substantive principles for measuring injunctive relief will assist judges in identifying relevant issues and arguments and in making decisions on the basis of principle rather than policy).



claim.<sup>21</sup> Never has the problem been more apparent than in the context of prophylaxis where commentators have confined the discussion of prophylaxis to the narrow, ancillary contexts of *Miranda*<sup>22</sup> and First Amendment overbreadth.<sup>23</sup>

In support of the trans-substantive theory of remedies, this Article will begin in Part I by identifying the principles of prophylactic relief demarcating its unique character and scope.<sup>24</sup> These rules, derived from the existing Supreme

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21. See Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-trans-substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2067-68 (1989); Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975); Geoffrey C. Hazard, *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237 (1989). However, the debate regarding the general or specific applicability of rules of procedure has moved from claim specific, to trans-substantive, and back to claim specific. See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 1030 (2000) (noting that "the enthusiasm in the 1930s for trans-substantive rules has given way to a preference for rules distinguishing among cases," and providing examples of prison litigation, 18 U.S.C. § 3626 (2000), securities litigation, 15 U.S.C. § 78u-4 (2000), complex litigation, and habeas litigation, 28 U.S.C. § 2254 (2000)). But see Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002) (arguing against subject-specific procedure changes that jeopardize the essence of trans-substantive rules of procedure).

22. See, e.g., Caminker, *supra* note 15; Richard H. Fallon, Jr., *Judicial Legitimacy and the Unwritten Constitution: A Comment on Miranda and Dickerson*, 45 N.Y.L. SCH. L. REV. 119 (2001-02); Grano, *supra* note 7; David Huitema, *Miranda: Legitimate Response to Contingent Requirements of the Fifth Amendment*, 18 YALE L. & POL'Y REV. 261 (2000); Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030 (2001); Richard H.W. Maloy, *Can a Rule be Prophylactic and Yet Constitutional?*, 27 WM. MITCHELL L. REV. 2465 (2001); David A. Strauss, *Miranda, the Constitution, and Congress*, 99 MICH. L. REV. 958 (2001); Strauss, *supra* note 15. In the context of prophylaxis, *Miranda* can be viewed at its more general level as a case about constitutional law broadly, encompassing both criminal and civil rights, rather than narrowly as a case about criminal rights.

23. See, e.g., Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31 (2003) (criticizing the Court's decision in *Hill v. Colorado* upholding prophylactic legislation that restricted the free speech rights of anti-abortion protests); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991) (describing a prophylactic theory of First Amendment overbreadth); Melissa L. Saunders, *Reconsidering Shaw: The Miranda of Race-Conscious Districting*, 109 YALE L. J. 1603 (2000); Daniel P. Tokaji, *Political Equality After Bush v. Gore: A First Amendment Approach to Voting Rights*, in THE FINAL ARBITER: LONG-TERM CONSEQUENCES OF BUSH V. GORE IN LAW AND POLITICS (forthcoming SUNY Press).

24. See *infra* Part I.

Court case law, define prophylaxis as injunctive relief composed of measures directing the legal conduct of defendant that contributes to the established harm. The prophylactic measures address facilitators of the harm or its prevention, and typically include specific measures requiring polices, training, monitoring, notice, or process.<sup>25</sup> However, the court's ability to impose broad injunctive relief reaching defendant's affiliated legal conduct beyond the illegal action itself is not unlimited. Prophylactic remedies have been upheld only where the enjoining of affiliated conduct is necessary to achieve the aim of remedying an illegality.<sup>26</sup> The measures included in prophylaxis have also been restricted to including affiliated conduct only where that conduct has a sufficient causal nexus to the legal harm.<sup>27</sup> This nexus is demonstrated by showing that the affiliated conduct shares a corresponding factual issue with the illegality and that the relationship is sufficiently close to justify its inclusion in the relief as measured by common notions of foreseeability and proximate cause.<sup>28</sup>

These limitations on prophylactic remedies gleaned from the case law requiring both proper means and ends become clearer when compared to the analogous limitations imposed by the Court in the related area of prophylactic legislation.<sup>29</sup> "Prophylactic legislation" is legislation passed by Congress pursuant to its remedial power under Section 5 of the Fourteenth Amendment authorizing Congress to enforce constitutional rights.<sup>30</sup> As in the case of judicial remedies, the Court has endorsed the use of broad prophylactic legislation to prevent complex legal problems by proscribing facially legal conduct.<sup>31</sup> However, just as with judicial reme-

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25. See *infra* Part I.B.

26. See *infra* Part I.C.1.

27. See *infra* Part I.C.2.

28. See *infra* Part I.C.2.

29. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997); see *infra* text accompanying notes 150-62 & 206-26.

30. See *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727 (2003) ("Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct."); U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

31. See *Hibbs*, 538 U.S. at 737 ("Congress is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment, but may prohibit a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."); *United States v.*

dies, legislative prophylaxis has been limited to statutes that target a legal harm and regulate legal conduct that is causally linked to the harm.<sup>32</sup> Without a restriction on the means and ends of prophylactic legislation, the congressional remedial power becomes a catchall power that usurps the limits of the remedial power designated in Section 5.<sup>33</sup> That is, an unrestrained legislative remedial power poses the same institutional concerns as unrestricted judicial remedial power in that both threaten to reach beyond the institutional actor's constitutional authority into the realm of a separate branch of government.<sup>34</sup>

After delineating the character and breadth of prophylaxis, this Article will then in Part II, explore the emerging principles of law governing the appropriate use of judicial discretion to select prophylactic relief.<sup>35</sup> Two principles of the appropriate use of equitable discretion to impose

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Morrison, 529 U.S. 598, 619 (2000) ("Section 5 is a positive grant of legislative power that includes authority to prohibi[t] conduct which is not itself unconstitutional and [to] intrud[e] into legislative spheres of autonomy previously reserved to the States.") (internal quotation marks and citations omitted); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) ("Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."); *City of Boerne*, 521 U.S. at 518 ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'") (citation omitted).

32. *Morrison*, 529 U.S. at 619 ("However, as broad as the congressional enforcement power is, it is not unlimited.") (citations omitted); *Kimel*, 528 U.S. at 81 ("Nevertheless, we have also recognized that the same language that serves as the basis for the affirmative grant of congressional power also serves to limit that power.").

33. See Marci A. Hamilton & David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469, 487 (1999) ("If Congress were permitted to enact rules that it calls 'prophylactic' without any proportionality review, it could increase its power under Section 5 geometrically."); Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 727 (2001) [hereinafter *Remedial Rights*].

34. See Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1945 (2003) (noting that "[t]he Rehnquist Court now views Section 5 power as a potential threat to the Court's role as the ultimate expositor of the constitutional text.") (internal quotation marks and citation omitted).

35. See *infra* Part II.

prophylactic relief emerge from the existing body of cases. First, courts order prophylactic relief generally as a remedy of last resort.<sup>36</sup> Defendants are given the first opportunity to remedy the harm by action or remedial plan.<sup>37</sup> Only where prophylaxis is necessary because other remedies including the defendant's own self-help have failed or are likely to fail have courts selected the powerful prophylactic remedy from among the arsenal of remedial weapons. Even then, courts are careful to evaluate the necessity of directing each specific action to ensure that the restriction of legal conduct does not unfairly trample upon defendants' legal rights or institutional concerns. Second, courts are limited in selecting prophylactic relief by the evidence and arguments presented in the remedial process.<sup>38</sup> The judge may not make up the prophylactic remedy out of whole cloth, but instead must solicit factual and legal inputs on the remedial question and then confine the remedial result to the established record. While the judge is able to use problem solving skills to creatively address complex legal problems, she may not deviate from the established record in imposing relief.

Finally, Part III of this Article answers the theoretical question of why prophylactic remedies are necessary, and indeed integral, to remedying legal rights.<sup>39</sup> The necessity of prophylactic relief stems from both a theoretical and instrumental function. At the theoretical level, prophylactic measures are able to provide tangible meaning to otherwise abstract rights by using its specificity to define those rights by example.<sup>40</sup> To define the color red, one might use examples of a tomato, blood, a cherry or a ruby to demonstrate the meaning by specific illustration.<sup>41</sup> So too, the prophylactic remedy illustrates the abstract meaning of legal rights

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36. See *infra* Part II.A.

37. See *infra* Part II.A.

38. See *infra* Part II.B.

39. See *infra* Part III.

40. See *infra* Part III.A.

41. See AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000), available at <http://www.bartleby.com> [hereinafter AMERICAN HERITAGE DICTIONARY]; WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1900 (1986); Definition of "red," available at <http://www.dictionary.com> (WordNet 1.6, Princeton University 1997) (last visited June 1, 2004). Compare these meaningful illustrative definitions with the explanatory definition of red: "The hue of the long-wave end of the visible spectrum, evoked in the human observer by radiant energy with wavelengths of approximately 630 to 750 nanometers." AMERICAN HERITAGE DICTIONARY, *supra*.

and thereby promotes a tangible understanding of the contours of those rights. The specificity of prophylaxis also fulfills a functional necessity of the court's enforcement of legal rights. The specificity and regulation of affiliated conduct avoids the defendants' resistance to conforming to the legal right, provides the defendants with clear notice of what compliance is required, and facilitates the court's ability to monitor that compliance.<sup>42</sup> Thus, the prophylactic remedy occupies a unique position in the law providing the courts with a powerful option to redress legal problems.

### I. THE DISTINCTIVE CHARACTER OF PROPHYLACTIC RELIEF

The prophylactic remedy is as distinctive in character as its name. The name, given to the remedy by the Supreme Court, often evokes giggles from law students hearing of the remedy for the first time.<sup>43</sup> The common dictionary definition of the word means to "take precautions against" or "to keep guard before."<sup>44</sup> It is this notion of prevention that is at the core of the legal definition of the term "prophylactic." *Black's Law Dictionary* defines "prophylactic" as an adjective meaning "formulated to prevent something."<sup>45</sup> This definition mirrors the use of the term in medicine to describe measures taken to prevent disease.<sup>46</sup> For example, prescriptive drugs may be given prophylactically to prevent disease prior to exposure, or vaccines may be given to prevent the contraction of disease.<sup>47</sup> The U.S. Supreme Court has used the term "prophylactic" to describe

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42. See *infra* Part III.B.

43. See AMERICAN HERITAGE DICTIONARY, *supra* note 41 (defining vernacular meaning of the term prophylactic to mean a device to prevent an undesired pregnancy), available at <http://www.bartleby.com>.

44. See AMERICAN HERITAGE DICTIONARY (4th ed. 2000), available at <http://www.bartleby.com>; XII OXFORD ENGLISH DICTIONARY 644 (2d ed. 1989).

45. BLACK'S LAW DICTIONARY 1234 (7th ed. 1999) (giving the example of "a prophylactic rule"). It is interesting to note that the definition of prophylactic was not added to Black's until 1999.

46. DORLAND'S MEDICAL DICTIONARY 1364 (28th ed. 1994) (defining "prophylactic" as "an agent that tends to ward off disease"); MERRIAM-WEBSTER'S MEDICAL DESK DICTIONARY 579 (1993) (defining "prophylactic" as "guarding from or preventing the spread or occurrence of disease or infection"); MOSBY'S DICTIONARY 1284 (4th ed. 1994) (defining "prophylaxis" as a biologic, chemical, or mechanical agent that prevents the spread of disease).

47. See MOSBY'S DICTIONARY 1284 (4th ed. 1994); THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 2095-97 (17th ed. 1999).

administrative rules,<sup>48</sup> legislation,<sup>49</sup> judicial remedies,<sup>50</sup> and private conduct.<sup>51</sup> The commonality of the use of the adjective prophylactic in each of these contexts is to describe additional measures imposed to restrict legal conduct in order to prevent future harm. The question, however, for this Article, is what precisely prophylactic means in the judicial remedial context.<sup>52</sup>

Prophylactic relief, as discussed below, is injunctive relief that addresses defendants' conduct attendant to the direct harm. The prophylactic remedy is seen in a variety of substantive contexts, including constitutional rights,<sup>53</sup> sex-

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48. *E.g.*, *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 103 (2002) (discussing administrative rules under FMLA as "prophylactic"); *Alexander v. Sandoval*, 532 U.S. 275, 307 (2001) (describing as "prophylactic" administrative regulations that provide measures to eliminate workplace discrimination); *United States v. O'Hagan*, 521 U.S. 642, 672-73 (1997) (upholding "prophylactic" securities regulation designed to prevent fraudulent trading); *FTC v. Mandel Bros.*, 359 U.S. 385, 393 (1959) (upholding the Commission's prophylactic remedy for violation of the Fur Labeling Act prohibiting the defendant's misbranding on six different labels, even though the proven violations concerned only three types of labels).

49. *See, e.g.*, cases cited *infra* note 152; *Hill v. Colorado*, 530 U.S. 703, 729 (2000) (describing Colorado statute aimed at preventing harm during abortion protests).

50. *See, e.g.*, *Schenck v. Pro-Choice Network*, 519 U.S. 357, 382 (1997); *Hutto v. Finney*, 437 U.S. 678, 712 (1978) (Rehnquist, J., dissenting).

51. Prophylactic measures imposed by private individuals are the issue in the First Amendment prophylaxis cases. In these cases, a defendant-imposed ordinance or rule has categorically banned speech in order to avoid some perceived harm. *See, e.g.*, *Illinois ex rel. Madigan v. Telemarketing Ass'n*, 538 U.S. 600 (2003) (discussing trilogy of cases of *Schaumburg*, *Munson*, and *Riley*, in which defendants have prohibited solicitation and telemarketing to combat fraud); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (prohibiting attorney solicitation). Such prophylaxis that is self-imposed by the defendant is often struck down by the Court as an impermissible, overly broad restriction of First Amendment rights. *See, e.g.*, *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781 (1988); *Sec'y of Md. v. Joseph H. Munson, Co.*, 467 U.S. 947 (1984); *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980). The mantra emerging from these cases is that "[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

52. For a discussion of prophylactic legislation, see *infra* text accompanying notes 150-62 & 206-26; see also Thomas, *Remedial Rights*, *supra* note 33; Hamilton & Schoenbrod, *supra* note 33.

53. *See, e.g.*, *Bush v. Gore*, 531 U.S. 98 (2000) (equal protection in vote recount); *Missouri v. Jenkins*, 515 U.S. 70 (1995) (school segregation); *Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 402 U.S. 1 (1971) (school segregation); *Anders v. California*, 386 U.S. 738 (1967) (right to counsel); *Miranda v. Arizona*,

ual harassment,<sup>54</sup> prison conditions,<sup>55</sup> abortion rights,<sup>56</sup> and economic regulation.<sup>57</sup> However, regardless of context,<sup>58</sup> there are two definitive attributes of the prophylactic remedy: it is (1) injunctive relief with a preventive goal, (2) that imposes specific measures reaching affiliated legal conduct that contributes to the primary harm.

### A. Prophylaxis as a Subset of Injunctive Relief

Prophylactic relief is a category of injunctive relief. Like all injunctions, it is an order from the court to the defendant enjoining negative conduct or commanding affirmative conduct.<sup>59</sup> The conduct addressed in a prophylactic injunction, unlike other equitable relief, directs legal conduct that is affiliated with, rather than the direct cause of or result of, the harm.<sup>60</sup> Prophylaxis encompasses this legal conduct in order to take additional precautions against future harm.

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384 U.S. 436 (1966) (right against self-incrimination and right to counsel); *Louisiana v. United States*, 380 U.S. 145, 155-56 (1965) (voting rights).

54. See, e.g., *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Sims v. Montgomery County*, 766 F. Supp. 1052 (M.D. Ala. 1999); *Neal v. Dir., D.C. Dep't of Corrs.*, No. 93-2420, 1995 WL 517244 (D.D.C. 1995); *Women Prisoners v. D.C. Dep't of Corrs.*, 877 F. Supp. 634 (D.D.C. 1994); *Lynch v. City of Des Moines*, 454 N.W.2d 827 (Iowa 1990).

55. See, e.g., *Lewis v. Casey*, 518 U.S. 343 (1996) (access to courts); *Hutto v. Finney*, 437 U.S. 678 (1978) (unconstitutional prison conditions); *Bounds v. Smith*, 430 U.S. 817 (1977) (access to courts); *Armstrong v. Davis*, 275 F.3d 849 (parole board discrimination against disabled); *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982) (conditions); *Women Prisoners v. D.C. Dep't of Corrs.*, 877 F. Supp. 634 (D.D.C. 1994) (conditions, program equality, medical care).

56. See, e.g., *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997); *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994).

57. E.g., *SEC v. Capital Gains*, 375 U.S. 180 (1963) (securities fraud); *FTC v. Mandel Bros.*, 359 U.S. 385 (1959) (deceptive fur labeling practices); *FTC v. Nat'l Lead Co.*, 352 U.S. 419 (1957) (antitrust price-fixing conspiracies); *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59 (D.D.C. 2000) (antitrust monopoly), *vacated by* 253 F.3d 34 (D.C. Cir. 2001).

58. The substantive context of prophylactic relief might be described generally as public law litigation. See Chayes, *supra* note 9, at 1284 (describing public law litigation broadly to include cases of antitrust, fraud, corporate governance, desegregation, employment discrimination, prison reform, and environmental law).

59. See DAN B. DOBBS, *LAW OF REMEDIES* 162 (2d ed. 1993).

60. See, e.g., *People Who Care v. Rockford Bd of Educ.*, 111 F.3d 528, 533 (7th Cir. 1997) ("The discretionary power of a district court to formulate an equitable remedy for an adjudicated violation of law is broad. Where necessary for the elimination of the violation, the decree can properly fence the defendant in by forbidding conduct not unlawful in itself.").

Thus, in order to prevent continuing or recurring harm, the court will address affiliated conduct that contributes to the harm in order to avert future wrongs.<sup>61</sup> For example, to prevent future sexual harassment caused by a hostile environment, the court might order the defendant company to enact anti-harassment policies, train employees on the meaning and law of sexual harassment, or adopt investigative and complaint procedures. Or in an economic regulation case, the court might prevent future harms by appointing an oversight board to monitor the defendant corporation's ongoing business.<sup>62</sup> The two key attributes of prophylactic relief, then, are its preventive goal and its enjoining of legal conduct. The prophylactic injunction, like all injunctions, is enforced by the contempt power that subjects the defendant to fines or imprisonment for failing to obey the court's order.<sup>63</sup> In this way, the prophylactic measures convert permissible conduct into illegal conduct for that particular defendant.<sup>64</sup>

The existing analytical framework of injunctive relief omits prophylaxis from its classification. The modern textbook description of the types of injunctive relief identifies three types: preventive, reparative, and structural.<sup>65</sup> A preventive injunction is a simple injunction that prevents

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61. SHOBEN & TABB, *supra* note 1, at 246 ("A prophylactic injunction seeks to safeguard the plaintiff's rights by directing the defendant's behavior so as to minimize the chance that wrongs might recur in the future."); *cf.* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485 (1977) (describing antitrust merger law as a "prophylactic measure, intended 'primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil'") (citations omitted).

62. *See, e.g.*, United States v. Microsoft Corp., 231 F. Supp. 2d 144 (D.D.C. 2002) (approving settlement that created a bipartisan technical committee and an internal compliance officer to monitor future business activities); *see also* United States v. Microsoft Corp., No. 98-1232, 2002 WL 31654530 (D.D.C. Nov. 12, 2002); *Microsoft Corp.*, 97 F. Supp. 2d at 69 (appointing an "Internal Antitrust Compliance Committee" consisting of a board and a chief compliance officer to oversee defendant corporation's future compliance with the antitrust laws).

63. DOBBS, *supra* note 59, at 130.

64. *See* SHOBEN & TABB, *supra* note 1, at 246 ("Violation of a prophylactic injunction is not necessarily a legal wrong in itself, except that the injunction makes it so.").

65. DOBBS, *supra* note 59, at 164; LAYCOCK, *supra* note 4, at 233. Professor Owen Fiss first coined the analytical terms "reparative" and "structural" relief to describe the orders issued in public law litigation. OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 7 (1978).



future harm by ordering the defendant to stop the illegal conduct.<sup>66</sup> A reparative injunction repairs past harm by correcting the existing effects and consequences of that harm.<sup>67</sup> A structural injunction alters the organizational structure,

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66. See, e.g., DOBBS, *supra* note 59, at 164 ("A preventive injunction attempts to prevent the loss of an entitlement in the future."); FISS, *supra* note 65, at 7-8 (describing the preventive injunction as a decree "which seeks to prohibit some discrete act or series of acts from occurring in the future" and comparing it to an individuated "mini-criminal statute"); SHOBN & TABB, *supra* note 1, at 246 ("The preventive injunction . . . has roots deep in the common law. Its purpose is to prevent the defendant from inflicting future injury on the plaintiff."). For example, a defendant found to have racially discriminated by segregating schools would be ordered to stop discriminating, or provide a unitary racial school system. *E.g.*, *United States v. Bd. of Pub. Instruction*, 977 F. Supp. 1202, 1211 (S.D. Fla. 1997) ("Defendants . . . are enjoined from discriminating against black students attending the public schools in Defendant district on the basis of race and are required to take further action, as described herein, to disestablish the dual system of schools based upon race.") (citations omitted). In another example from the *Microsoft* antitrust case, the company found to have violated the law prohibiting monopolies was ordered in essence to "stop violating the antitrust laws by maintaining its operating system monopoly through its browser." *Microsoft Corp.*, 97 F. Supp. 2d at 68; see also *Microsoft*, 2002 WL 31654530, at \*2 (prohibiting company from restricting manufacturer or end user ability to alter browser function).

67. See DOBBS, *supra* note 59, at 164 ("The reparative injunction requires the defendant to restore the plaintiff to a preexisting entitlement."); FISS, *supra* note 65, at 7-8 (describing the reparative injunction as a decree "which compels the defendant to engage in a course of action that seeks to correct the effects of a past wrong" and analogizing it to an in-kind damage award); LAYCOCK, *supra* note 4, at 269 ("The distinction between preventive and reparative injunctions is between preventing the wrongful act . . . and preventing some or all of the harmful consequences of that act."); see also SHOBN & TABB, *supra* note 1, at 246 (using the label "restorative" to define an injunction that "principally operates to correct the present by undoing the effects of a past wrong. The notion of 'restoring' means that it focuses not only prospectively, as does the traditional preventive injunction, but also retroactively."). In the school desegregation example, the defendant school might be ordered in reparative relief to redress the deficiencies in education by adopting remedial education programs to bolster student learning. In the *Microsoft* monopoly example, reparative relief might order the defendant to correct the consequences of its monopoly by requiring the licensing of previously denied software and providing the functional ability to allow users to disconnect the *Microsoft* browser and use that of the competitor. *Microsoft Corp.*, 97 F. Supp. 2d at 667-68; *Microsoft*, 2002 WL 31654530, at \*3 (ordering the disclosure of concealed computer codes); see also *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967) (ordering a reparative injunction to remedy the racial discrimination during an election by setting aside the election and ordering a new special election); *Vasquez v. Bannworths, Inc.*, 707 S.W.2d 886 (Tex. 1986) (ordering a reparative injunction requiring defendant to rehire employee wrongfully discharged because of her union affiliation).

rather than behavioral aspects, of an illegal institution.<sup>68</sup> Prophylactic relief, if identified at all, has been subsumed within either reparative<sup>69</sup> or structural injunctions.<sup>70</sup> This

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68. FISS, *supra* note 65, at 7 (describing the structural injunction, "which seeks to effectuate the reorganization of an ongoing social institution"); *Justice*, *supra* note 9, at 2 ("The structural suit is one in which a judge, confronting a state bureaucracy over values of constitutional dimension, undertakes to restructure the organization to eliminate a threat to those values posed by the present institutional arrangements."). In the school desegregation example, the school organization itself is ordered to alter its dual racial structure and adopt a unitary racial system rather than simply stopping its discriminatory behavior. FISS, *supra* note 65, at 9; *Justice*, *supra* note 9, at 2-3. Structural relief in the Microsoft monopoly case would have restructured the company into two companies, one for the Windows operating system and one for the remaining software products. *Microsoft Corp.*, 97 F. Supp. 2d at 64.

69. See, e.g., LAYCOCK, *supra* note 4; SHOEN & TABB, *supra* note 1, at 246 (categorizing together restorative and prophylactic injunctions). This theory conceptualizes prophylaxis as any broad injunctive relief that reaches wide to redress the harm. LAYCOCK, *supra* note 4 (explaining case of overbroad injunctive scope as prophylactic); SCHOENBROD, *supra* note 4, at 37, 131 (defining prophylactic relief as any relief which gives the plaintiff more than its rightful position). For example, injunctions that reach broadly across geographic districts or company locations have been categorized as prophylactic. See, e.g., LAYCOCK, *supra* note 4, at 283 (exemplifying prophylactic relief by case of Mantek Division v. Share Corp., 780 F.2d 702 (7th Cir. 1986), where an injunction was issued by the trial court prohibiting former employees from selling competitor's goods anywhere in their former sales territory); SCHOENBROD, *supra* note 4, at 179 (characterizing as prophylactic the injunction in Sterling Drug, Inc. v. Bayer AG, 14 F.3d 733 (2d Cir. 1994), barring use of "Bayer" name in the United States and in all foreign publications likely to cause confusion to U.S. consumers). In addition, blanket prohibitions of conduct resulting from a breach have also been classified as prophylactic. See, e.g., LAYCOCK, *supra* note 4, at 285 (classifying as prophylactic the injunction in PepsiCo, Inc. v. Redmond, 54 F.3d 1262 (7th Cir. 1995), prohibiting former employee from ever working for rival because of likelihood that trade secrets would be revealed and classifying order in Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277 (Pa. 1992), prohibiting law firm from representing competitors of a former client from which it had received confidential information of value to competitors); SCHOENBROD, *supra* note 4, at 131 (describing as prophylactic relief the injunction in Paramount Pictures v. Davis, 228 Cal. App.2d 827 (1964), prohibiting Bette Davis from working for any studio until she completed her role for Paramount as contracted); SCHOENBROD, *supra* note 4, at 164 (classifying as prophylactic the injunction in PepsiCo prohibiting former employee from ever working for a rival because of the likelihood that trade secrets would be revealed). This remedial classification based on the categorical prohibition of conduct likely stems from the judicial use of the term in the First Amendment context to describe municipal and organizational rules that broadly prohibit all speech. See *supra* note 23 and accompanying text. However, these blanket prohibitions imposed by the defendants are prophylactic not because of the absoluteness of their ban on conduct, but rather due to the preventive goal of the defendant entity which initially enacted the ban to avoid future illegal conduct.

categorization, however, incorrectly depicts the prophylactic injunction and fails to recognize its distinct goal and measures that differentiate it from the other categories.<sup>71</sup> An accurate classification and recognition of prophylactic relief is important to understand the available remedial options and to counter the accusations of prophylaxis' illegitimacy, which are founded in large part upon a misconception of the parameters of this remedy.

In my view, a more accurate classification of injunctive relief would identify the three core types of injunctions as (1) preventive, (2) reparative, and (3) prophylactic. Structural relief would be reserved as a label for a hybrid

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These injunctions are simply reparative injunctions rectifying the consequences of the harm by relief that is broad in scope, not prophylactic in character. The analytical problem with characterizing prophylactic relief as any overbroad relief is that it feeds into the critic's argument that prophylactic relief is simply a blanket license to use equity to overreach. Moreover, the reparative characterization of prophylaxis is fundamentally flawed because the reparative relief focuses on the post-deprivation time period. Prophylactic relief, to the contrary, addresses conduct preceding a threatened harm in order to prevent that harm; it does not reach out to correct the consequences of that harm.

70. See, e.g., DOBBS, *supra* note 59, at 643 (describing orders requiring notice of employee rights or instituting a grievance system as a type of structural injunction that is "simple in comparison" to usual structural injunctions); FISS, *supra* note 65, at 13; LAYCOCK, *supra* note 4; Chayes, *supra* note 9, at 1281; Landsberg, *supra* note 2, at 936 (recognizing that "[p]rophylactic commands became a central feature of what some came to call the structural injunction"). The construct of structural relief as an all-encompassing public law remedy might explain how prophylactic relief has at times been subsumed within structural relief. Owen Fiss, in first describing the contours of his new remedial category of "structural relief," described structural relief as an injunction aimed at transforming the nature of the institution itself to conform to constitutional values. FISS, *supra* note 65, at 13. The distinguishing characteristics of the structural injunction were, according to Fiss, its goal of institutional reform, its alteration of institutional structure rather than behavior, its complexity, its impact upon societal groups, and its establishment of an ongoing relationship between the court and the defendant. *Id.* As an aside, Fiss noted that courts might sometimes accomplish structural change by the use of specific orders giving the defendants precise, practical steps to follow. *Id.* Similarly, Professor Dobbs in his classic remedies treatise acknowledged the existence of a simpler, more specific type of injunctive measure contained within some structural relief. DOBBS, *supra* note 59, at 643.

71. If anything, prophylactic relief is a subset of preventive relief providing a more complex order to prevent future harm. See Landsberg, *supra* note 2, at 926-27 n.6 (stating that prophylactic "measures have also been called 'preventive remedial,' but that phrase seems too limited because it sounds like ordinary preventive relief, aimed directly at the core violation than at risk") (citations omitted); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

injunction combining any or all of the three core injunctions and focused on structural rather than behavioral change.<sup>72</sup> The three core types of injunctive relief are available in every case to address the legal wrong at each phase of the harm continuum. Preventive relief addresses the core harm by ordering the cessation of illegal activity. Reparative relief addresses the subsequent consequences of that harm by redressing the resulting effects of the illegal act. Prophylactic relief focuses on the pre-harm time period in order to direct conduct that has a tendency to contribute to or facilitate the primary harm (Diagram A).

### Diagram A

### ***Prophylactic***

### Facilitators →

*Preventive*                      *Reparative*  
CAUSE-----HARM-----CONSEQUENCES

## Facilitators →

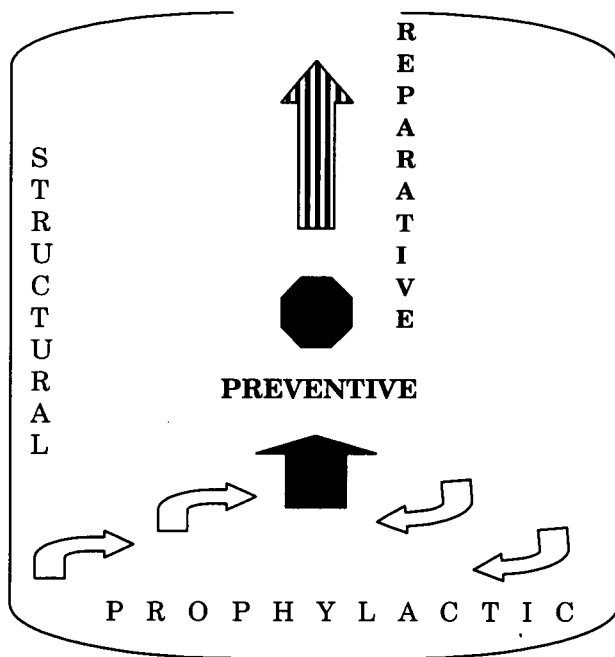
This triumvirate of equitable relief allows the courts to redress harms more comprehensively and holistically. The court is able to treat the whole legal problem of contributor, cause, and effect rather than ineffectively applying remedial band-aids to the direct wound.

Diverging from the existing classification model, it is also possible to understand the different types of injunctive relief as alternative adjectives used to describe the equitable relief imposed by the court. It might be useful to think in terms of different labels for these remedies, perhaps substituting the descriptions of short, tall, wide, and round (Diagram B). A preventive injunction is short relief because it is a simple, minimalist order that requires the defendant to stop the harm. A reparative injunction is tall relief because it stretches tall to reach the continuing consequences of the past harm. A prophylactic injunction is wide in that it sweeps out wide to bring in affiliated legal conduct in order to prevent future harm. Prophylactic is not a third category of height, but rather provides an alternative description of relief by honing in on the most important characteristic—the width or breath of the relief. Structural

72. See *infra* notes 73-74 and accompanying text.

relief can be described as round because it extends all around to encompass the short, tall, and wide aspects of relief by using all means to alter the structure of the institution.

**Diagram B**



Structural relief emerges as a hybrid rather than a separate category of injunctive relief. For structural relief commonly is ordered as both preventive and reparative relief.<sup>73</sup> The important characteristic of structural relief as

73. *E.g.*, *United States v. Virginia*, 518 U.S. 515 (1996) (ordering structural change in single sex military institution to both prevent and correct discrimination); *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59, 64 (D.D.C. 2000) (ordering structural injunction of divestiture as preventive relief to stop the continuation of the monopoly), *vacated by* 253 F.3d 34 (D.C. Cir. 2001); DOBBS, *supra* note 59, at 164 (stating that structural injunctions “would be simple reparative or preventive injunctions if they merely ordered authorities to carry out or to cease some specific act” rather than restructuring an institution); FISS, *supra* note 65, at 13 (describing structural relief as complex series of preventive and reparative injunctions distinguished by its alteration of the structure of the defendant’s institution).

compared with the other categories is its alteration of the very structure of an institution as opposed to the behavior of the institutional actors.<sup>74</sup> Defined analytically, structural relief is a rarely occurring type of remedy.<sup>75</sup> Structural relief should be distinguished from the theory of remedial process that accompanied its original conceptualization. Both Professors Chayes and Fiss initially advocated for the structural injunction as part of a remedial process for public law rights that differed from private law.<sup>76</sup> They envisioned an ongoing remedial process directed by an activist judge that focused on the transformation of a social condition affecting a social group rather than correcting an incident of wrongdoing against individual plaintiffs.<sup>77</sup> This theory of remedial activism drew substantial criticism over the years, leading to a suspicion of structural relief and public law remedies in general.<sup>78</sup> However, time has shown that judges generally do not act in this activist fashion, but rather, impose public law remedies using the same adjudicatory process as in private law cases.<sup>79</sup> Thus, the structural injunction construct should be extricated from its associated context of judicial activism, and recognized as one of the four possible types of injunctive relief in any given case.<sup>80</sup>

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74. See *Justice*, *supra* note 9, at 7-9; Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1 (2001) (addressing the economic realities of a structural injunction ordering divestiture of Microsoft); *Microsoft Corp.*, 97 F. Supp. 2d at 61 (indicating that the court was considering injunctive relief that would mandate both conduct modification and structural reorganization).

75. FISS, *supra* note 65, at 8 (arguing that the structural injunction emerges from among the other types of injunctions as "a truly unique legal instrument"); *Justice*, *supra* note 9, at 17 ("[S]tructural reform surely is a transformation; it looks breathtakingly different.").

76. See Chayes, *supra* note 9, at 1281; *Justice*, *supra* note 9, at 18-28.

77. See *Justice*, *supra* note 9, at 18-28.

78. DOBBS, *supra* note 59, at 645 (describing the skepticism with which structural injunctions are viewed); see, e.g., Yoo, *supra* note 7, at 1123; Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978).

79. See *infra* Part II.B; Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1627 (2003) (conducting a study of school desegregation remedies from 1992 to 2002 and concluding that judges do not behave in atypical, activist ways in imposing public law remedies, but rather follow a process common to most private litigation).

80. See FISS, *supra* note 65, at 9-10 (noting that the antecedents to the desegregation structural injunction could be found in the railroad monopoly cases of the turn of the century and the modern antitrust divestiture cases).

Ultimately, the utility of the four labels characterizing injunctive relief lies in their ability to analytically describe the relief ordered by courts. The categories reinforce that the exercise of remedial equity is not the random use of each judge's individual views and biases, but rather, is a constrained authority to impose one of four types of permissible measures when injunctive relief is requested and necessary. Perhaps more importantly, the injunctive categories assist lawyers and courts in initially crafting equitable relief in a given case. The parties can think through each category of injunctive relief as they routinely do with damages (*i.e.*, general, consequential, incidental, pecuniary, and non-pecuniary damages) to conceptualize what type of relief may be appropriate in their case. The categories thus circumscribe the arguments in equity and provide the courts and lawyers with a common language in discussing equitable relief. Thus, the starting point for understanding prophylactic relief is recognizing it as a distinct subset of injunctive relief designed ultimately to prevent future harm.<sup>81</sup>

### *B. The Specific Measures Directing Affiliated Legal Conduct*

The hallmark of prophylactic relief, distinguishing it from other injunctive remedies, is its specificity in directing legal conduct affiliated with, but not causing, the legal harm. Prophylaxis encompasses "affiliated conduct," that is, secondary conduct that is causally linked with the direct harm, but which itself does not violate the law.<sup>82</sup> For example, in the sexual harassment context, the harassment of the employee by an individual is the primary cause of the harm that violates law. Yet, affiliated conduct, such as the company culture, the corporate policies, and the corporate response, may all contribute to that harassment even though the lack of a policy or training itself does not violate the law. These contributors of harm may be addressed by the court in a prophylactic order when necessary to redress

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81. See Thomas, *Prophylactic Remedies*, *supra* note 1, at 366-74 (disagreeing with the academic conceptualization of prophylaxis as a judicial "rule" and explaining the remedial character of prophylaxis).

82. *Cf.* United States v. O'Hagan, 521 U.S. 642, 672-73 (1997) ("A prophylactic measure, because its mission is to prevent, typically encompasses more than the core activity prohibited.").

a legal violation.<sup>83</sup> Prophylactic relief is therefore distinguished from among the other injunctive remedies by its inclusion of specific safeguards or measures adding to relief prohibiting or correcting the primary legal harm.

The ability of this remedy to use specificity and precision to hone in on affiliated conduct is what makes this remedy effective at redressing the whole of the legal problem.<sup>84</sup> Other remedies are often inadequate to provide the necessary holistic solution to a complex legal problem.<sup>85</sup> The concept of holistic treatment derived from medicine refers to the treatment of the patient's diet, environment, and psychological being in addition to the medical treatment of the primary disease.<sup>86</sup> The holistic theory is that to prevent

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83. *E.g.*, *Women Prisoners v. D.C. Dep't of Corrs.*, 877 F. Supp. 634, 679-81 (D.D.C. 1994), *overruled in part*, 93 F.2d 910 (D.C. Cir. 1996) (overturning appointment of special officer to monitor and investigate sexual harassment complaints).

84. *See Justice*, *supra* note 9, at 47-49; Schoenbrod, *supra* note 5, at 675; *infra* Part III.A.

85. Chayes, *supra* note 9, at 1295 (stating that simple prohibitory orders such as "stop denying treatment to mental patient" are inadequate to provide meaningful relief in public law litigation). *See* MODEL RULES OF PROF'L CONDUCT R. 2.1 & cmt. 2 (2002) (indicating that lawyers should address moral, economic, social and political considerations to provide meaningful advice to the client).

86. AMERICAN HERITAGE DICTIONARY, *supra* note 41 (defining holistic medicine as "an approach to medical care that emphasizes the study of all aspects of a person's health, including physical, psychological, social, economic, and cultural factors"), available at <http://www.bartleby.com>. The American Holistic Health Association defines "holistic" health in the following way:

Holistic health is actually an approach to life. Rather than focusing on illness or specific parts of the body, this ancient approach to health considers the whole person and how he or she interacts with his or her environment. It emphasizes the connection of mind, body, and spirit. The goal is to achieve maximum well-being, where everything is functioning the very best that is possible. With Holistic Health people accept responsibility for their own level of well-being, and everyday choices are used to take charge of one's own health.

SUZAN WALTER, THE ILLUSTRATED ENCYCLOPEDIA OF BODY-MIND DISCIPLINES (1999), available at <http://www.ahha.org/rosen.htm> (last visited Apr. 9, 2004). *See also* [www.holisticmed.com/whatis.html](http://www.holisticmed.com/whatis.html) (last visited Apr. 9, 2004) ("Holistic medicine is a system of health care which fosters a cooperative relationship among all those involved, leading towards optimal attainment of the physical, mental emotional, social and spiritual aspects of health. It emphasizes the need to look at the whole person, including analysis of physical, nutritional, environmental, emotional, social, spiritual and lifestyle values."); Michael H. Cohen, *A Fixed Star in Health Care Reform: The Emerging Paradigm of Holistic Healing*, 27 ARIZ. ST. L. J. 79, 88 (1995) ("Holistic healing refers to a paradigm of health care that 'recognize[s] the importance of considering the condition of the patient as well as the disease and advances the theory that the psyche and the soma,



or cure a powerful disease, healthcare practitioners must address all factors that contribute to the patient's health.<sup>87</sup> Similarly, prophylactic relief allows the courts to address all of the factors contributing to the legal "disease" in order to prevent a powerful problem of public import. Indeed, the types of harms seen in cases of prophylaxis tend to be among the most severe in civil law. These cases involve egregious harms that threaten personal integrity, personal liberty,<sup>88</sup> or rights otherwise prioritized in the law.<sup>89</sup> Thus, prophylactic relief is necessary, and even integral, to effective judicial response to existing complex problems.

The holistic solution provided by prophylactic relief may, like any injunction, be affirmative or prohibitive in nature.<sup>90</sup> An affirmative prophylactic remedy would require affirmative steps to prevent harm, while a prohibitive prophylactic remedy would enjoin the negative facilitators that tend to contribute to harm. The types of negative facilitators addressed by the court through prophylactic measures are varied depending upon the factual causes of the harm in a given case.<sup>91</sup> Perhaps the most-well-known example of a prophylactic remedy prohibiting a facilitator of legal harm is the prison case of *Hutto v. Finney*.<sup>92</sup> In *Hutto*, the

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the mind and the body, are one.' In holistic healing, 'all parts of the system—body, mind, spirit, environment, society—are interrelated and interact to produce health or disease; illness reflects an imbalance between the individual and the wider world.'") (citations omitted).

87. See generally WILLIAM COLLINGE, M.P.H., PH.D., *THE AMERICAN HOLISTIC HEALTH ASSOCIATION COMPLETE GUIDE TO ALTERNATIVE MEDICINE* (1996); JAMES S. GORDON, *HOLISTIC MEDICINE* (1988).

88. *McKune v. Lile*, 536 U.S. 24, 49 (2002) ("For instance, in *Miranda v. Arizona*, 384 U.S. 436, 455 (1966), we found that an environment of police custodial interrogation was coercive enough to require prophylactic warnings only after observing that such an environment exerts a 'heavy toll on individual liberty.' But we have not required *Miranda* warnings during noncustodial police questioning.").

89. See *PUBLIC VALUES IN CONSTITUTIONAL LAW* (Stephen E. Gottlieb ed., 1993); Levinson, *supra* note 71; SCHOENBROD, *supra* note 4, at 94 ("Courts generally place a higher value on constitutional, statutory, and common law property rights than they do on enforcement of commercial promises . . .").

90. See DOBBS, *supra* note 59, at 163-64 (discussing mandatory and prohibitory injunctions); LAYCOCK, *supra* note 4, at 264 (explaining that injunctions can both forbid conduct and require action).

91. *E.g.*, *United States v. Bd. of Pub. Instruction*, 977 F. Supp. 1202 (S.D. Fla. 1997) (ordering that future school construction and site selection be done in a manner that prevents the recurrence of the dual racial school structure).

92. 437 U.S. 678 (1978). Justice Rehnquist's dissent pejoratively labeled the injunction as a "prophylactic rule." He disagreed with the majority's conclusion

Supreme Court upheld an injunction limiting punitive isolation to a maximum of thirty days even though the practice itself was found not to violate the Eighth Amendment.<sup>93</sup> The Court upheld the restriction on punitive isolation because it was one factor facilitating the unconstitutional conditions of overcrowding and rampant violence.<sup>94</sup>

Other examples of prophylaxis banning negative facilitators can be seen in the abortion protest cases of *Madsen v. Women's Health Center, Inc.*,<sup>95</sup> and *Schenck v. Pro-Choice Network*.<sup>96</sup> In *Madsen* and *Schenck*, a key facilitator of the legal harm was the proximity of the protestors and the clients and employees of the abortion clinic.<sup>97</sup> The prophylactic relief addressed the negative facilitator of the proximity by imposing a buffer zone around the clinic that the protestors were prohibited from entering.<sup>98</sup> In addition, the *Schenck* Court addressed the proximity problem of protestors approaching individuals by requiring protestors to "cease and desist" and move away from an individual if she did not want to hear the message being conveyed.<sup>99</sup>

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that the period of time in punitive isolation related to the condition found offensive to the Constitution, and thus simply differed from the majority as to whether the isolation was in fact a facilitator of the legal harm. *See id.* at 712.

93. *Id.* Confinement in punitive isolation was for an indeterminate period of time during which an average of four and sometimes as many as eleven prisoners were crowded into windowless 8' x 10' cells containing no furniture other than a water source and a toilet where they were given fewer than 1000 calories a day and fed "grue," a substance created by mashing meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning into a paste and baking the mixture in a pan. *Id.* at 682-83.

94. *Id.* at 684 (finding that punitive isolation is one of the interdependent conditions that can lead to overcrowded cells, vandalized cells, rampant violence, and inadequate diet).

95. 512 U.S. 753 (1994).

96. 519 U.S. 357 (1997).

97. 512 U.S. at 755; 519 U.S. at 359.

98. *Schenck*, 519 U.S. at 380 (affirming an injunction prohibiting demonstrations within 15 feet of the entrance to the abortion clinic); *Madsen*, 512 U.S. at 753 (affirming in part an injunction ordering protestors to stay off clinic's property and to stay off public property within 36 feet of the clinic's property line).

99. *Schenck*, 519 U.S. at 357, 383-84 (affirming injunction permitting two sidewalk counselors within the 15-foot zone but requiring them to cease and desist from talking to any person who asked them to leave); *see also* *Hill v. Colorado*, 530 U.S. 703, 707-08 (2000) (upholding COLO. REV. STAT. § 18-9-122, making it unlawful for any person to knowingly approach another person within eight feet for the purpose of protesting when that person is within a radius of 100 feet from any entrance door to a health care facility).

This remedial principle is also found in the private context of unfair competition. The Court in *Federal Trade Commission v. National Lead Co.*, prohibited the negative facilitator of "zone-delivered pricing," which was a system by which the defendant sellers set the same delivered price for all customers in a particular geographic zone.<sup>100</sup> The Court prohibited competitors from using similar zone-delivered pricing because that system resulted in an anticompetitive conspiracy in the given case and was found by the court to facilitate illegal price fixing in general among the defendant companies.<sup>101</sup> Thus, courts use prophylactic relief to ban conduct that is likely to contribute to future harm of the type demonstrated in the case.

Prophylactic relief is also imposed to require defendants to take affirmative measures that will protect against the occurrence of future harm.<sup>102</sup> These prophylactic measures mandating affirmative facilitators of prevention are either case specific or process oriented. As with prophylaxis involving negative facilitators, relief addressing affirmative facilitators will conform its measures to the contributing realities demonstrated by the case.<sup>103</sup> For example, in the desegregation case of *Swann v. Charlotte-Mecklenburg County*,<sup>104</sup> the evidence and argument at trial demonstrated that racial segregation in the schools was caused by the primary conduct of the school's assignment policy, and facilitated by the realities of segregation in housing and economic segregation. The prophylactic measures adopted by the *Swann* Court of busing, gerrymandered attendance zones, and quotas were aimed at preventing future school segregation by addressing the contributing cause of the housing segregation.

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100. 352 U.S. 419, 430 (1957) ("[D]ecrees often suppress a lawful device when it is used to carry out an unlawful purpose. In such instances the Court is obliged not only to suppress the unlawful practice but to take such reasonable action as is calculated to preclude the revival of the illegal practice.").

101. *Id.* at 426 (limiting the use of zone-delivered pricing because the practice readily lent itself to price fixing and the history of its unlawful use was pervasive in the industry).

102. *E.g.*, *Women Prisoners v. D.C. Dep't of Corrs.*, 877 F. Supp. 634, 679 (D.D.C. 1994).

103. *E.g.*, *id.* at 679-90 (requiring affirmative steps with respect to sexual harassment, obstetrical and gynecological care, educational programs, and fire and environmental safety as dictated by the evidence).

104. 402 U.S. 1 (1971).

In addition, the cases of prophylactic relief addressing affirmative facilitators commonly impose process-oriented measures to protect against the threatened harm. Regardless of the substantive context of the case, prophylactic measures often require procedural safeguards such as institutional policies, procedures, training, notice, or monitoring. Prophylactic cases routinely require defendants to develop new policies, such as an anti-harassment policy or a race-neutral assignment policy.<sup>105</sup> These policy remedies are designed to address the problem from the top-down by instituting internal mechanisms that establish organizational cultures designed to avoid harm and that allow the defendant to self-regulate against future harm independent of the court. Courts also impose procedures upon defendants through prophylactic relief to provide them with a series of tangible steps to follow to avoid a recurrence of harm.<sup>106</sup> Examples of prophylactic procedures imposed by the courts include the complaint and grievance processes mandated in sexual harassment cases,<sup>107</sup> the vote recount process mandated in *Bush v. Gore*,<sup>108</sup> and the parole procedures required to avoid future discrimination against parolees.<sup>109</sup> Employees of the defendant organizations then may also be ordered by prophylactic relief to undergo train-

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105. *E.g., id.* at 679, 680 ("Within 60 days, the Defendants shall write and follow a Department Order prohibiting sexual harassment involving District of Columbia Department of Corrections ("DCDC") employees and women prisoners . . . . Under this policy the DCDC has the obligation to take appropriate steps to prevent and remedy sexual harassment committed by its own employees . . . . Prohibited conduct under the policy shall be defined as . . . .").

106. *See supra* text accompanying notes 103-104; *infra* text accompanying notes 106-07; *North Carolina v. Pearce*, 395 U.S. 711, 725-26 (1969) (mandating process to avoid harsher sentence on resentencing after successful appeal); *Anders v. California*, 386 U.S. 738, 744 (1967) (adopting procedure governing withdrawal of counsel to protect defendant's right to counsel).

107. *E.g., Bundy v. Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981) ("Perhaps the most important part of the preventive remedy will be a prompt and effective procedure for hearing, adjudicating, and remedying complaints of sexual harassment within the agency. The Director should promptly take all necessary steps to investigate and correct any harassment, including warnings and appropriate discipline directed at the offending party, and should generally develop other means of preventing harassment within the agency."). Process can be as simple as a hotline to report sexual harassment, or complex system for reporting, investigating, and sanctioning sexual harassment. *See Women Prisoners*, 877 F. Supp. at 680-81.

108. 531 U.S. 98, 110 (2000) (per curiam).

109. *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001).

ing on the new policy<sup>110</sup> to ensure the proper implementation of the processes.

The fourth common prophylactic measure of a procedural nature requires notice to the plaintiff or disclosure by the defendant. Prophylactic remedies mandating notice are designed to prevent future violations of rights by addressing the significant causal contributor of the plaintiff's own lack of knowledge.<sup>111</sup> For example, in the sexual harassment cases, defendant companies notify employees of relevant policies or procedures by posting notices on bulletin boards or circulating letters.<sup>112</sup> In the case of *Securities and Exchange Commission v. Capital Gains Research Bureau, Inc.*,<sup>113</sup> the Supreme Court required an investment adviser who violated the securities fraud law to disclose his own personal securities dealings to future clients when he advised them to make the same investments.<sup>114</sup> This notice

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110. *Bundy*, 641 F.2d at 947 (ordering the director of the agency "to raise affirmatively the subject of sexual harassment with all his employees and inform all employees that sexual harassment violates Title VII of the Civil Rights Act of 1964, the Guidelines of the EEOC, the express orders of the Mayor of the District of Columbia, and the policy of the agency itself"); *id.* at 948 n.15 (ordering the director of the agency "to develop other appropriate means of instructing employees of the Department of the harmful nature of sexual harassment" and to train employees on how to report sexual harassment and file grievances to enforce their rights); *Women Prisoners*, 877 F. Supp. at 681 (ordering training conducted by an industry expert and containing certain mandatory information regarding the policies and processes for sexual harassment). In voting cases, courts have ordered the training of personnel involved in recounts to ensure the proper implementation of recount policy. *See Bush*, 531 U.S. at 109 (noting additional concerns with Florida Supreme Court injunction which failed to specify who would recount ballots and forced county canvassing boards to pull together "ad hoc teams of judges" with "no previous training in handling and interpreting ballots").

111. *E.g.*, *Women Prisoners*, 877 F. Supp. at 682 ("Defendants shall inform all women prisoners of the procedure to access health services while incarcerated.").

112. *E.g.*, *Bundy*, 641 F.2d 934, 948 n.15 (ordering defendants to "notify all employees and supervisors in the Department through individual letters and permanent posting in prominent locations throughout Department offices, that sexual harassment" violates the law and departmental policy); *Women Prisoners*, 877 F. Supp. at 679 ("The Defendants shall post and circulate the Department Order in accordance with departmental policy."); *see also United States v. Microsoft Corp.*, 97 F. Supp. 2d 59, 69 (D.D.C. 2000) (requiring defendant to provide notice to employees of the final judgment and injunction in the antitrust case accompanied by an explanation of that ruling to defendant's employees), *vacated by* 253 F.3d 34 (D.C. Cir. 2001).

113. 375 U.S. 180 (1963).

114. *Id.* at 181-82.

was important to providing the investment clients with the knowledge needed to avoid potential harm.<sup>115</sup> And the infamous case of prophylaxis, *Miranda*, and its required warnings of a suspect's constitutional rights, show that prophylactic remedies are often imposed to ensure that the potential victim has sufficient knowledge of his rights under the law.<sup>116</sup> For knowledge is power—and that power enables the plaintiff herself to prevent the harm.<sup>117</sup>

The last, but perhaps most common, prophylactic measure imposing process-related affirmative measures upon the defendant requires monitoring of the defendant by the court or third party.<sup>118</sup> In an early case of prophylaxis, the Supreme Court in *Louisiana v. United States* imposed reporting requirements to ensure that the defendant's future actions did not cause repeated race discrimination in voting.<sup>119</sup> In prison condition litigation, courts routinely order the defendants to submit reports to the plaintiffs or the court documenting compliance with the ordered relief.<sup>120</sup> Courts may also appoint third parties to oversee the implementation of the ordered change or monitor future compliance with the law.<sup>121</sup> And in the *Microsoft* antitrust case, in

115. *Id.*

116. *Miranda v. Arizona*, 384 U.S. 436 (1966).

117. The phrase is attributed to Francis Bacon (1561-1621), a philosopher, writer, and scientist: "Knowledge is power. The more one knows, the more one will be able to control events." THE NEW DICTIONARY OF CULTURAL LITERACY 52 (E.D. Hirsch Jr. et al. eds., 3d ed. 2002); see also *Proverbs* 24:5 ("A wise man is strong; yea, a man of knowledge increaseth strength.").

118. LAYCOCK, *supra* note 4, at 285 ("Another common prophylactic provision is [the] monitoring of defendant's compliance with the injunction."); *United States v. Bd. of Pub. Instruction*, 977 F. Supp. 1202, 1227 (S.D. Fla. 1997) (explaining an earlier order that required defendants "to file with the Court and provide to the parties annual reports containing a variety of information on the operation of the school system").

119. 380 U.S. 145, 155-56 (1965) (upholding prophylactic decree: "It also was certainly an appropriate exercise of the District Court's discretion to order reports to be made every month concerning the registration of voters in these 21 parishes, in order that the court might be informed as to whether the old discriminatory practices really had been abandoned in good faith.").

120. *E.g.*, *Hutto v. Finney*, 437 U.S. 678, 683 (1978) (describing district court's initial order providing the prison defendants with the first opportunity to remedy the proven harm, but requiring defendants to file reports on its progress); *Ruiz v. Estelle*, 679 F.2d 1115, 1143, 1143 n.126 (5th Cir. 1982) (upholding district court requirement that defendant file reports on the number of inmates and space per inmate).

121. *E.g.*, *Bd. of Pub. Instruction*, 977 F. Supp. at 1227 (explaining an earlier order in a school desegregation case that established a bi-racial commit-

order to monitor the defendant corporation's future business practices, the district court initially created an internal compliance committee and authorized the inspection of the company's books and accounts upon request by plaintiff.<sup>122</sup>

Thus, the key distinguishing characteristic of all prophylactic relief is its ability to address the contributing causes or facilitators of harm through specific measures. While this ability to reach related legal conduct is broad, it is not unlimited. For, as discussed below, the courts have restricted the use of the prophylactic remedy by permitting it to address only those facilitators that are causally linked to the proven harm.

### *C. The Limited Reach of Prophylactic Relief*

Prophylaxis then is properly described as relief that "sweeps broadly to include legal conduct."<sup>123</sup> This breadth is the core of the effectiveness of the prophylactic remedy, but it has also served as the lightning rod for attacks on prophylaxis.<sup>124</sup> Critics argue that the remedy is overbroad in

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tee to be charged with "responsibility for discussing ways and means of achieving racial harmony and understanding among the students, teachers and parents and shall function as an advisory body to the school board"; *cf.*, *United States v. Akers*, 785 F.2d 814, 823 (9th Cir. 1986) (upholding district court's grant of injunctive relief requiring defendant to seek advance approval from the Corps of Engineers prior to any dredging or filling operations where the defendant had drained swamps without the required wetlands permit and lied to the Corps about his operations).

122. *See United States v. Microsoft Corp.*, 97 F. Supp. 2d 59, 69-70 (D.D.C. 2000), *vacated by* 253 F.3d 34 (D.C. Cir. 2001); *United States v. Microsoft Corp.*, No. 98-1232, 2002 WL 31654530 (D.D.C. Nov. 12, 2002) (ordering creation of technical committee to monitor future business actions, hiring of internal compliance officer by defendant corporation, and authorizing access and inspection by plaintiffs).

123. Strauss, *supra* note 22, at 959 (explaining that "in principle, *Miranda* is no different from any number of well-established rules of constitutional law that also, in a sense, 'sweep[] more broadly than the [Constitution] itself'" (quoting *Oregon v. Elstad*, 470 U.S. 298, 306 (1985); Thomas, *Remedial Rights*, *supra* note 33, at 707, 727; *cf.* *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) ("Legislation which deters or remedies constitutional violations, can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional . . .").

124. *See Yoo*, *supra* note 7, at 1126-29; *cf. Hill v. Colorado*, 530 U.S. 703, 775 (2000) (Kennedy, J., dissenting) (dissenting from affirmation of prophylactic legislative measure: "Overbreadth is a constitutional flaw, not a saving feature.").

that it inappropriately “overprotects” plaintiff by giving her more than the operative right requires.<sup>125</sup> The standard rule of injunctive relief is that the scope of the remedy must be confined by the scope of the harm in order to restrain the judge from exceeding his power to decide judicial cases.<sup>126</sup> The overbroad prophylactic remedy seemingly fails to conform to this tailoring requirement, and thus, it has been argued that prophylaxis constitutes judicial overreaching by judges who impose their own view of justice not dictated by the right itself.<sup>127</sup>

These criticisms of the illegitimacy of prophylactic relief, however, are based on an inaccurate assumption that the use of prophylactic relief is unconstrained by any limiting principles.<sup>128</sup> To the contrary, the breadth of prophylaxis is not haphazard or subject merely to the whim of the

125. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 801-810 110 Stat. 1321 1321-66 to -77 (1996) (codified in scattered sections of 11, 18, 28, and 42 U.S.C.) (reacting to the perception of prophylactic injunctions as overprotecting prisoners' rights by limiting injunctive relief in prisoner cases arising out of conditions of confinement to the minimum necessary to correct the legal violation); *Duckworth v. Eagan*, 492 U.S. 195, 209 (1989) (O'Connor, J., concurring) (“Like all prophylactic rules, the *Miranda* rule ‘overprotects’ the value at stake.”); Paul G. Cassell, *The Paths Not Taken: The Supreme Court’s Failures in Dickerson*, 99 MICH. L. REV. 898, 905 (2001) (arguing that *Miranda*’s automatic rule “overprotects” a constitutional right: “Overprotection means protection beyond what the Constitution requires.”); Klein, *supra* note 22, at 1033 (describing prophylactic rules as those that overprotect constitutional rights); Landsberg, *supra* note 2, at 969; Thomas G. Saylor, *Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged Prophylactic Rule*, 59 N.Y.U. ANN. SURV. AM. L. 283, 303 (2003) (describing Justice Scalia’s dissent in *Dickerson* as criticizing the “use of any form of prophylaxis in constitutionalism, expressing the view that doctrine should be congruent with constitutional values, and therefore the Court lacks the authority to overprotect”); Yoo, *supra* note 7, at 1126-29. *But see* Caminker, *supra* note 15, at 28 n.91 (arguing that the common characterization of prophylactics of “overprotecting” legal rights should end because it “wrongly assumes some ‘natural’ baseline of lesser protection”).

126. See, e.g., *Milliken v. Bradley*, 433 U.S. 267, 281-82 (1977).

127. See *Dickerson v. United States*, 530 U.S. 428, 446, 461, 465 (2000) (Scalia, J., dissenting).

128. *Missouri v. Jenkins*, 515 U.S. 70, 114 (1995) (Thomas, J., concurring) (“[W]e have permitted the federal courts to exercise virtually unlimited equitable powers to remedy this alleged constitutional violation.”); Yoo, *supra* note 7, at 1128 (arguing that the expansion of judicial remedial authority in the prophylactic and structural injunction cases was accompanied by an unwillingness of the Court to impose any meaningful limitation upon the courts’ exercise of equitable discretion); see also *Hill*, 530 U.S. at 762 (Scalia, J., dissenting) (declaring that “[p]rophylaxis is the antithesis of narrowly tailoring”).



particular judge. Instead, prophylactic measures are constrained by two limiting principles routinely applied by the courts in crafting prophylactic relief. First, the prophylactic remedy must be narrowly targeted at redressing the proven harm, rather than aimed at some ancillary social concern.<sup>129</sup> Second, the affiliated conduct included in the prophylactic relief must demonstrate a sufficient causal nexus to the established harm.<sup>130</sup> These limitations of prophylactic relief emanate from the Article III requirement that judicial power be confined to "cases or controversies."<sup>131</sup> Thus, prophylactic relief properly tailored to the two limiting principles constitutes a legitimate exercise of the courts' remedial power.<sup>132</sup>

1. *Targeting the Legal Harm.* The initial assumption was that prophylaxis could not, and should not, be explained as conforming to the tailoring rule.<sup>133</sup> Early supporters of prophylactic remedies tried to justify the presumed departure from tailoring. Professors Fiss and Chayes argued that untailored prophylactic remedies were needed to provide the courts with the necessary flexibility to achieve social justice in public law cases.<sup>134</sup> To them, the beauty of the prophylactic remedy was its ability to work

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129. See *infra* Part I.C.1; cf. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 204 (2000) (Scalia, J., dissenting) (stating that "remediation" that is the traditional business of Anglo-American courts is relief specifically tailored to the plaintiff's injury, and not any sort of relief that has some incidental benefit to the plaintiff").

130. See *infra* Part I.C.2.

131. U.S. CONST. art. III, § 2, cl. 1; Landsberg, *supra* note 2, at 956-58; cf. *Allen v. Wright*, 468 U.S. 737, 761 (1984) ("When transported into the Art. III context, that principle, grounded as it is in the idea of separation of powers, counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties.").

132. See Thomas, *Prophylactic Remedies*, *supra* note 1, at 374-80.

133. See Chayes, *supra* note 9, at 1293-94 ("The form of relief does not flow ineluctably from the liability determination, but is fashioned ad hoc."); Justice, *supra* note 9, at 46-47.

134. See Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982); Chayes, *supra* note 9; FISS, *supra* note 65; Justice, *supra* note 9, at 46-47.

outside the traditional confines of the positive law to instill public values.<sup>135</sup>

Professor Schoenbrod rejected this general attack on the tailoring rule, and illustrated the long acceptance of the rule as well as its continuing importance.<sup>136</sup> He explained that the remedial tailoring rule is intended to avoid social activism by judges, minimize judicial intrusion on the defendant, and provide predictability in the discretionary arena of equitable remedies.<sup>137</sup> Schoenbrod though, like Fiss and Chayes, approved of the use of prophylactic remedies. He asserted that prophylactic injunctions could in fact constitute properly tailored relief.<sup>138</sup> He distinguished between the terms and the aim of an injunction.<sup>139</sup> For Schoenbrod, as long as the aim of the injunction was tailored to the proven harm, the terms of the injunction could permissibly reach wider than the direct harm if necessary.<sup>140</sup> That is, if the prophylactic remedy furthered the purpose of the right by aiming at returning the plaintiff to her rightful position (*i.e.*, the position she would have been in but for the harm), then the terms could reach any affiliated legal conduct in order to ensure protection and enforcement of the injunction. However, where that proportional aim was lacking, prophylactic relief would be improper in scope.

Thus, the first rule of limitation for prophylactic relief as explained by Professor Schoenbrod is that it must aim to remedy an existing harm.<sup>141</sup> The Court has followed

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135. *Justice*, *supra* note 9, at 47 (arguing that the tailoring principle fundamentally misleads because it suggests a formalistic quality that is not actually present between right and remedy).

136. SCHOENBROD, *supra* note 4, at 133; Schoenbrod, *supra* note 5, at 671.

137. Schoenbrod, *supra* note 5, at 676, 691 ("Abandoning the tailoring doctrine, however, is not a satisfactory alternative because doing so simply permits judges to engage in completely unconstrained policy making.").

138. *Id.* at 671.

139. *Id.* at 678.

140. *Id.* (arguing that a prophylactic measure that grants more than the plaintiff's rightful position is appropriate if it furthers the goals of the law).

141. *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) ("[F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution . . ."); *see also* *Lewis v. Casey*, 518 U.S. 343 (1996); *Lewis*, 518 U.S. at 392 (Thomas, J., concurring); *Missouri v. Jenkins*, 515 U.S. 70, 91, 134-36 (1995); *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 534 (7th Cir. 1997) (stating that equitable remediation should be "guided by norms of proportionality. That is, the remedy must be tailored to the violation, rather than the violation's being a pretext for the remedy. Violations of law must be dealt with firmly, but not used to launch federal courts on ambitious

Schoenbrod's principle requiring properly targeted relief by rejecting remedial orders that improperly target social concerns other than the threatened legal harm.<sup>142</sup> Sometimes stated in doctrinal terms, the rule becomes that a remedial decree must be designed to return the plaintiffs to their rightful position where they would have been but for the harm.<sup>143</sup> The lack of this requisite remedial goal has been the most common failing of injunctive relief overturned by the Supreme Court as overbroad.<sup>144</sup> In *Missouri v. Jenkins*, the Court struck down prophylactic measures designed to reverse white flight by creating attractive public schools in the city.<sup>145</sup> The key failing of that remedial order was its aim at a social problem—white flight—that was not itself a constitutional wrong.<sup>146</sup> In *Lewis v. Casey*, the district court

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schemes of social engineering") (citations omitted); *Newman v. Alabama*, 559 F.2d 283, 287 (5th Cir. 1977) ("It does mean in the prison context that federal courts should keep their eyes on the main objective, the Eighth Amendment command for the eradication of cruel and unusual punishment. The remedy must be designed to accomplish that goal, not to exercise judicial power for the attainment of what we as individuals might like to see accomplished in the way of ideal prison conditions.").

142. *Lewis*, 518 U.S. at 392; *Jenkins*, 515 U.S. at 134-36; *Freeman v. Pitts*, 503 U.S. 467 (1992); cf. *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 969-70 (1984) (invalidating state regulation of charitable solicitation because it was aimed not at fraud but at the percentage of funds collected in the hope that it would sweep fraud in during the process).

143. *United States v. Virginia*, 518 U.S. 515, 547 (1996); *Lewis*, 518 U.S. at 357 (1996); *Jenkins*, 515 U.S. at 88; *Milliken*, 433 U.S. at 280.

144. See *Lewis*, 518 U.S. at 357-60; *Jenkins*, 515 U.S. at 134-36; *Freeman*, 503 U.S. at 487 (invalidating remedy requiring annual readjustment of racial composition of schools to ensure "no majority of minority" from future housing migration changes where remedy addressed emerging social problem rather than redressing past violation of law or its consequences).

145. 515 U.S. 70 (1995), *rev'g* 639 F. Supp. 19 (W.D. Mo. 1985) (ordering prophylactic measures addressing magnet programs, capital improvements, local property tax, and a Model United Nations meeting hall wired for language).

146. The *Jenkins* Court invalidated the remedial decree because it was designed for the purpose of achieving "desegregative attractiveness" to reverse white flight rather than curing unconstitutional segregation. 515 U.S. at 91-98; *id.* at 112 (O'Connor, J., concurring) (stating that the "authority contained in Article III of the Constitution limit[s] the judiciary's institutional capacity to prescribe palliatives for societal ills. The unfortunate fact of racial imbalance and bias in our society, however pervasive or invidious, does not admit of judicial intervention absent a constitutional violation"); *id.* at 136 (Thomas, J., concurring) (holding that trial court "failed to target its equitable remedies in this case specifically to cure the harm suffered by the victims"); see also *Parker*,

aimed its prophylactic order at improving the management of the prison library rather than the legal wrong of the prisoners' denial of access to the courts.<sup>147</sup> However, when courts fail to react to legal wrongs, they step outside the confines of their judicial powers, as Justice Thomas discussed in his concurrence in *Lewis*.<sup>148</sup> Thus, as Professor Schoenbrod recognized, prophylactic relief, like all remedies, must be targeted to the established legal wrong to avoid the risk of illegitimate judicial action.<sup>149</sup>

Similarly, Congress' power under Section 5 of the Fourteenth Amendment to enact prophylactic legislation has been restricted to legislation that aims at an identified legal wrong. The Supreme Court has interpreted Congress' power under the Section 5 enforcement clause of the Fourteenth Amendment to be a remedial power.<sup>150</sup> Accordingly, the

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*supra* note 18, at 487-506 (discussing in depth the facts and remedial significance of *Missouri v. Jenkins*).

147. *Lewis*, 518 U.S. at 392 (Thomas, J., concurring) ("The District Court also 'failed to target its equitable remedies in this case specifically to cure the harm suffered by the victims' of unconstitutional conduct." (quoting *Jenkins*, 515 U.S. at 136)); see also FEELEY & RUBIN, *supra* note 9, at 13-20 (noting that judges in prison cases in the 1960s to 1980s uniformly sought to impose better prison management conforming to industry standards rather than remediation of the constitutional problem). In fairness, the district court's detour in *Casey v. Lewis*, 773 F. Supp. 1365 (D. Ariz. 1991), seems to have been its belief that the prophylactic remedy aimed at the prison law library ordered in *Bounds v. Smith*, 430 U.S. 817 (1977), itself created a new actionable right and therefore crafted its injunction to respond to the denial of the perceived *Bounds* right. See *infra* text accompanying notes 345-62.

148. 518 U.S. at 385-93 (Thomas, J., concurring); accord *Jenkins*, 515 U.S. at 114-138 (Thomas, J., concurring).

149. Schoenbrod, *supra* note 5, at 671; SCHOENBROD, *supra* note 4, at 37, 353.

150. *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000); Thomas, *Remedial Rights*, *supra* note 33, at 722-39 (exploring the meaning of remedial prophylactic legislation under Section 5). The academic debate continues as to why the parameters of Section 5 legislative power should be interpreted analogously to the judicial power. Most commentators continue to argue that the Court's Section 5 jurisprudence is incorrect and that the Section 5 power should be construed broadly in the same manner as other general legislative powers. See JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* 148 (Univ. of Cal. Press 2002) (asking "why Congress should be confined to the remedial. The fourteenth amendment assigns Congress the role of enforcing its guarantees. The amendment assigns no role to the court."); Evan H. Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1131 (2001) (arguing that Section 5 power should be interpreted according to rational relation test of regular Article I legislation); Samuel Estreicher &

Court has used the analogue of judicial remedial power to define the parameters of the legislature's designated remedial power.<sup>151</sup> In a recent spate of cases, the Court has explained the doctrinal limitations of prophylactic legislation.<sup>152</sup> Commentators have universally criticized the Court for its failure to establish criteria capable of distinguishing appropriate from inappropriate remedial legislation, accus-

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Margaret H. Lemos, *The Section 5 Mystique*, Morrison, and the Future of Federal Antidiscrimination Law, 2000 SUP. CT. REV. 109, 134 n.105 (finding the argument that the Section 5 proportionality test may be justified by reference to the law of remedies "ultimately unpersuasive, for it fails satisfactorily to explain why Congress's power should be adjudged by the same standards that govern the ability of lower courts to fashion remedies for constitutional or statutory violations"). *But see* Hamilton & Schoenbrod, *supra* note 33, at 469-70 (arguing that the test may be justified by reference to the law of remedies requiring any judicially crafted remedy must respond proportionally to the wrong it seeks to redress); Thomas, *Remedial Rights*, *supra* note 33, at 722-24 (endorsing interpretation of Section 5 using judicial remedial analogues); Ernest A. Young, *Is the Sky Falling on the Federal Government? State Sovereign Immunity, the Section Five Power, and the Federal Balance*, 81 TEX. L. REV. 1551 (2003) (reviewing JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002)) (disagreeing with Judge Noonan and arguing for the plausibility of interpreting Section 5 as a prophylactic remedial power). The short answer is that the drafters of Section 5 rejected a general legislative power to do all that was "necessary and proper," and instead, adopted language describing a remedial power to "enforce" the Amendment by providing substitute remedies in the derogation of that responsibility by southern courts. *See* Thomas, *supra* note 33, at 707-09. In choosing to circumscribe legislative power, the drafters of Section 5 must have intended something different from the usual legislative authority. *But see* Ruth Colker, *The Supreme Court's Historical Errors in City of Boerne v. Flores*, 43 B.C. L. REV. 783 (2002) (arguing that the Supreme Court made significant historical errors in interpreting Section 5 as a remedial rather than interpretive authority); James W. Fox, Jr., *Re-readings and Misreadings: Slaughter-House, Privileges or Immunities, and Section Five Enforcement Powers*, 91 KY. L.J. 67 (2002) (tracing history of privileges and immunities clause and Section 5 to suggest a source of broad interpretive power).

151. *See* Hamilton & Schoenbrod, *supra* note 33, at 486 ("[T]he law of remedies helps to provide a background understanding of what it means to 'enforce' a right within the meaning of Section 5. The Supreme Court should not give Congress more latitude in determining whether it has exceeded its remedial power under Section 5 than the Court grants lower courts in determining whether they have exceeded their remedial power."); Thomas, *Remedial Rights*, *supra* note 33, at 714-39.

152. *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); United States v. Morrison, 529 U.S. 598 (2000); *Kimel*, 528 U.S. at 62; Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); *Flores*, 521 U.S. at 507.

ing the Court of endorsing a standard for unaccountable judicial decisionmaking.<sup>153</sup> However, the criteria for prophylactic legislation are apparent on the face of the opinions, but perhaps lack meaning in the absence of an accurate understanding of judicial prophylaxis.<sup>154</sup> For without restrictions on Section 5 relief, the remedial power becomes a plenary power that contradicts the express bargain made in the constitutional amendment.<sup>155</sup>

The Court's first stated limitation of prophylactic legislation is that it, like prophylactic judicial relief, must be targeted to address an identified constitutional violation.<sup>156</sup>

153. See Post & Siegel, *supra* note 34, at 1949 (arguing that the current Supreme Court "enforcement model" of Section 5 power does not offer a coherent framework for distinguishing between Section 5 laws that unconstitutionally "interpret" the Fourteenth Amendment and Section 5 laws that merely "enforce" it, and claiming that "[w]ithout guidance from the enforcement model itself, the decisions of the Rehnquist Court have been driven by implicit policy preferences"); NOONAN, *supra* note 150; Young, *supra* note 150, at 1575 (describing Judge Noonan's reaction to the Section 5 proportionality requirement: "Judge Noonan is shocked—shocked!—by the proportionality test: This formula was unprecedented. Proportionality in legislation! Who would measure the proportion?"); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 85-86 (2001) (describing the "crystal ball" or "phantom legislative history" test of Section 5 proportionality established by the Court to support its judicial activism in striking down acts of Congress); cf. Caminker, *supra* note 150, at 1133 (arguing that the "Court's decision to subject all prophylactic Section 5 measures to significantly more rigorous means-ends scrutiny than measures that carry into execution Congress' various Article I and other powers cannot persuasively be defended").

154. See, e.g., *Garrett*, 531 U.S. at 365 (applying the "now familiar principles" of prophylactic legislation to the Americans with Disabilities Act); see also Hamilton & Schoenbrod, *supra* note 33, at 481 (explaining Section 5 proportionality requirement by reference to the law of remedies); Landsberg, *supra* note 2, at 926 ("Once one understands the bases for prophylactic rules, it becomes possible to define the boundaries between legitimate and illegitimate judicial prophylactic action."); Thomas, *Remedial Rights*, *supra* note 33, at 720-739 (explaining contours of prophylactic legislation by reference to cases imposing prophylactic injunctions).

155. *Morrison*, 529 U.S. at 619-20 (indicating that "several limitations inherent in § 5's text and constitutional context have been recognized since the Fourteenth Amendment was adopted . . . . These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National government."); Hamilton & Schoenbrod, *supra* note 33, at 487 ("If Congress were permitted to enact rules that it calls 'prophylactic' without any proportionality review, it could increase its power under Section 5 geometrically."); *Remedial Rights*, *supra* note 33, at 727.

156. *Hibbs*, 538 U.S. at 735-37; *Kimel*, 528 U.S. at 88-91; *The Civil Rights Cases*, 109 U.S. 3, 12-13, 17 (1883); Hamilton & Schoenbrod, *supra* note 33, at

Initially, Congress must make findings sufficient to identify an actual or perceived violation.<sup>157</sup> For the remedial posture of Section 5 dictates that Congress react to a legal wrong, like a court, rather than address a general societal problem, which it may do under one of its alternative legislative powers.<sup>158</sup> At its core, prophylactic legislation must be targeted at the legitimate end of responding to unconstitutional conduct.<sup>159</sup>

The failure of Congress to aim its prophylactic legislation at a legitimate end has been the downfall of most of the Section 5 legislation considered by the Supreme Court to date.<sup>160</sup> However, in the Family Medical Leave Act

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471, 481 (stating that Congress must first identify conduct transgressing Fourteenth Amendment); *Remedial Rights*, *supra* note 33, at 714-720 (discussing in depth the requirement that Section 5 legislation respond to an identified violation of a constitutional right). Others have preferred to phrase this remedial limitation in the traditional legislative powers terms of *McCullough v. Maryland* and its interpretation of the necessary and proper clause, stating that the legislation must be aimed at a legitimate end. *E.g.*, J. Randy Beck, *The Heart of Federalism: Pretext Review of Means-End Relationships*, 36 U.C. DAVIS L. REV. 407 (2003); Caminker, *supra* note 150, at 1127; Thomas, *Remedial Rights*, *supra* note 33, at 721.

157. Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653, 667-69 (2000) (describing the importance of fact finding to valid Section 5 legislation); Thomas, *Remedial Rights*, *supra* note 33, at 716; Erin Rosen, Case Note, *An Occasion for a More Thorough Analysis: The New Findings Requirement and Congressional Power Under Section 5 of the Fourteenth Amendment After United States v. Morrison*, 90 CAL. L. REV. 573 (2002).

158. The benefit of enacting legislation under Section 5 is that the states have waived their Eleventh Amendment immunity from suit for damages in the Fourteenth Amendment, and thus Congress is able to enforce legislation by monetary remedies. *Hibbs*, 538 U.S. at 724; *Garrett*, 531 U.S. at 363; Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After City of Boerne v. Flores*, 32 IND. L. REV. 163, 169-70 (1998) (stating that Congress considers Section 5 to be the preferable mode of regulating the states because there is no interstate commerce requirement, eleventh amendment state immunity, rule of general applicability, or budgetary requirements of spending money); *see also Morrison*, 528 U.S. at 607 ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." (quoting *Marbury v. Madison*, 1 Cranch 137, 176 (1803))).

159. Beck, *supra* note 156; Caminker, *supra* note 150; Thomas, *Remedial Rights*, *supra* note 33, at 714-21.

160. *Garrett*, 531 U.S. at 366-72 (invalidating the Americans with Disabilities Act as applied to state employers on grounds that Congress failed to identify a predicate constitutional violation); *Morrison*, 529 U.S. at 625-26 (invalidating the Violence Against Women Act, which provided a civil remedy for victims of domestic violence because the attempted prophylactic legislation

("FMLA"), Congress finally got it right. The Supreme Court held in *Nevada Department of Human Resources v. Hibbs* that Congress properly targeted its prophylactic legislation of the FMLA by aiming at gender discrimination by the states against women in the workplace.<sup>161</sup> The FMLA targeted gender discrimination against working women by enacting prophylactic measures specifying twelve-week unpaid family leave for both sexes to address the adverse employment action against women.<sup>162</sup> Thus, where prophylactic remedial legislation properly responds to an identified legal harm, it, like judicial prophylaxis, will be upheld.

2. *Sufficient Causal Nexus*. In addition to a proper aim, prophylactic remedies are limited to addressing legal conduct that has a sufficient causal nexus to the harm. The causal nexus is established where the affiliated conduct bears a factual relationship to the harm and the relation-

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improperly aimed at the societal problem of domestic violence committed by private actors rather than gender discrimination perpetrated by the states); *Kimel*, 528 U.S. at 91 (invalidating the Age Discrimination in Employment Act for targeting state employers' violations of the statute rather than unconstitutional conduct); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647-48 (1999) (invalidating the Patent and Plant Variety Protection Remedy Clarification Act permitting damages actions against state governments for patent infringement on grounds that the statute's basic aims were to provide a uniform remedy for patent infringement and to place States on the same footing as private parties which was a legitimate aim under Congress' Article I powers but not under Section 5 of the Fourteenth Amendment); *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997) (invalidating Religious Freedom Restoration Act for targeting legal laws of zoning, land-use, and fair housing as applied to religious practices).

161. *Hibbs*, 538 U.S. at 735 ("In sum, the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation."). Justices Kennedy, Scalia, and Thomas dissented on this point, finding that the evidence failed to establish a constitutional violation by the states at which prophylactic legislation could be targeted. *See id.* at 741 (Scalia, J., dissenting); *id.* at 749 (Kennedy, J., dissenting) ("The question is not whether the family leave provision is a congruent and proportional response to general gender-based stereotypes in employment which ha[ve] historically produce discrimination in the hiring and promotion of women"; the question is whether it is a proper remedy to an alleged pattern of unconstitutional discrimination by States in the grant of family leave. The evidence of gender-based stereotypes is too remote to support the required showing.") (alteration in original) (citation omitted).

162. *Id.* at 735-37; *see* Family Medical Leave Act, 29 U.S.C. § 2612(a)(1)(C) (2000).



ship is of sufficiently close degree to justify the inclusion of the conduct in the prophylactic order.<sup>163</sup> This type of causal nexus test is seen in other areas of the law where it is used to restrict judicial action to the parameters of the relevant law while providing the necessary flexibility to apply that law to the particular facts of each case.<sup>164</sup> In the case of prophylactic relief, the nexus test aids in establishing the required remedial proportionality of mandating that the scope of injunctive relief conform to the scope of the harm in order to avoid judicial overreaching. The nexus test circumscribes the scope of the harm by including within the definition of "harm" that secondary conduct which has a sufficient causal connection to the primary illegality. Thus, the

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163. BLACK'S LAW DICTIONARY 1066 (7th ed. 1999) (defining "nexus" as "[a] connection or link, often a causal one").

164. For example, parallels exist in the law of antitrust, takings, state action, and sometimes standing. In antitrust law, a nexus test is used to determine the availability of judicial relief by evaluating whether plaintiff's business losses are of the type that the antitrust laws were intended to prevent and flow from the unlawful conduct of the defendant. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (holding that injuries must be "of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful"); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 122 (1986) (holding same for injunctive relief). In takings law, the court must determine whether there is an "essential nexus" between the legitimate state interest asserted for the taking and the permit condition extracted. *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987). In the state action cases, a nexus test requires a "sufficiently close relationship" between the state and the private actor in order for the private action to be attributable to the state. *Wittstock v. Mark A. Van Sile, Inc.*, 330 F.3d 899, 902 (6th Cir. 2003); *Kirtley v. Rainey*, 326 F.3d 1088, 1095 (9th Cir. 2003). To establish taxpayer standing for constitutional claims, plaintiffs must show their complaint falls within the zone of interest protected by the law by establishing a logical nexus between their status and the claim. *Flast v. Cohen*, 392 U.S. 83, 102 (1968) ("Such inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial power."); *Allen v. Wright*, 468 U.S. 737, 759 (1984) ("The idea of separation of powers that underlies standing doctrine explains why our cases preclude the conclusion that respondents' alleged injury 'fairly can be traced to the challenged action' of the IRS. That conclusion would pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations.") (citation omitted). *But see* *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 203 (2000) (Scalia, J., dissenting) (suggesting that dual nexus test of standing had "fallen into desuetude" and was a proxy for the requirement that plaintiff's injury be redressable by the court).

nexus test for prophylactic relief is used to provide the courts with the flexibility to reach legal conduct needed to prevent future harm while constraining those courts from going beyond their remedial mandate.<sup>165</sup>

The first element of the causal nexus test for prophylactic measures is a required factual connection between the affiliated conduct and the harm. The law in other contexts imposes such a factual nexus requirement to assure that judicial action address the type of harm prohibited by law.<sup>166</sup> For prophylactic relief, the requisite factual relationship can be shown by demonstrating that the affiliated and illegal conduct share the same subject matter or the same issue.<sup>167</sup> This threshold requirement, while seemingly loose,

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165. *Cf. Dolan*, 512 U.S. at 390 (requiring nexus to distinguish between “an appropriate exercise of the police power and an improper exercise of eminent domain” by determining “whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit”).

166. *Nollan*, 483 U.S. at 837 (finding no factual nexus between the commission’s asserted interest in promoting public visual access to the ocean and the permit condition requiring lateral public access along the plaintiff’s beachfront lot); *cf. Dolan*, 512 U.S. at 387 (discussing absence of factual nexus in *Nollan* and finding essential nexus in this case where governmental purposes of preventing flooding and traffic congestion were connected to the permit conditions requiring easements for flood plain and pedestrian/bicycle walkway); *Brunswick Corp.*, 429 U.S. at 489 (holding that antitrust plaintiff failed to prove that injury though causally related was of the “type the antitrust laws were intended to prevent” where business losses resulted from increased rather than restrained competition); *Flast*, 392 U.S. at 102 (requiring the plaintiff establish a dual nexus for standing of showing “a logical link” between the plaintiff’s taxpayer status and “the type of legislative enactment attacked” and a “nexus between that status and the precise nature of the constitutional infringement alleged”); *Gumm v. Apfel*, 17 F. Supp. 2d 1213 (D. Kan. 1998) (requiring factual nexus for social security disability claim between impairment and the claimed pain for which plaintiff is claiming disability); *Farb v. Fed. Kemper Life Assurance Co.*, 213 F.R.D. 264, 267 (D. Md. 2003) (identifying required “factual nexus” between amendment and original complaint for amendment of pleadings).

167. *Lewis v. Casey*, 518 U.S. 343, 358 (1996); *cf. Riley v. Nat’l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 793 (1981) (invalidating law regulating charitable solicitation on the basis of the amount of funds collected by the organization due to the lack of nexus between the amount of funds retained by the fundraiser and the likelihood of fraud); *Lau v. Nichols*, 414 U.S. 563, 571 (1974) (administrative prophylactic regulations promulgated for Title VI may go beyond the specific law as long as they are “reasonably related” to its antidiscrimination mandate).

is not always met.<sup>168</sup> In *Lewis v. Casey*,<sup>169</sup> all nine Supreme Court Justices found that the prophylactic measures addressing noise, lighting, law book pocket parts, and library hours did not share the same type of legal issue as the proven harm of illiterate inmate access to the courts.<sup>170</sup> While the measures dealt with the general topic of legal assistance to inmates, the harm proven in the case related only to illiterate and non-English-speaking prisoners. Thus, all measures not factually connected with illiterate inmates were omitted from the decree.<sup>171</sup> Measures, however, providing individual lawyers or jailhouse assistants to aid the illiterate inmates were factually connected to the subject matter of the harm and properly included in injunctive relief.<sup>172</sup> In another example, the court in the school desegregation case of *People Who Care v. Rockford Board of Education*<sup>173</sup> struck down prophylactic measures imposing racial quotas for teachers.<sup>174</sup> The Seventh Circuit held that the harm established at trial related only to racial discrimination against students, not teachers, and thus, the measures addressing the societal concern of faculty diversity were not sufficiently factually related to warrant inclusion in the remedial decree.<sup>175</sup>

Second, the factual connection between the affiliated conduct and the harm must be sufficiently close to justify

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168. See, e.g., *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 771 (1994) (invalidating prophylactic measure banning abortion protests within 36-foot buffer zone on private property where there was no evidence that protestors standing on private property obstructed access to the clinic or otherwise contributed to the interference with plaintiffs' rights).

169. 518 U.S. 343 (1996).

170. *Id.* at 356-60; *id.* at 390-93 (Thomas, J., concurring); *id.* at 393-98 (Souter, J., concurring); *id.* at 409 (Stevens, J., dissenting in part).

171. *Id.* at 356-60, 397-98 ("At the outset, therefore, we can eliminate from the proper scope of this injunction provisions directed at special services or special facilities required by non-English speakers, by prisoners in lockdown, and by the inmate population at large. If inadequacies of this character exist, they have not been found to have harmed any plaintiff in this lawsuit, and hence were not the proper object of this District Court's remediation.").

172. *Id.* at 348, 359-61.

173. 111 F.3d 528 (7th Cir. 1997).

174. *Id.* at 532, 534.

175. *Id.* at 534. The Seventh Circuit also invalidated prophylactic measures addressing quotas for racial composition on the cheerleading squad finding that the provision was "indefensible" and could not possibly be justified in the absence of evidence of discrimination against cheerleaders. *Id.* at 538.

the inclusion of the conduct in the court's order.<sup>176</sup> This type of causal nexus requiring a sufficiently close degree of relationship is analogous to nexus requirements imposed on judicial action in other areas of the law.<sup>177</sup> The degree of relationship required for prophylactic relief is established by showing a *foreseeable* and *proximate causal* link between the measures and the harm. The foreseeability limitation requires some basis of knowledge to anticipate that the prophylactic measure has the potential to prevent harm.<sup>178</sup> For example, if expert testimony during the trial indicated that the lack of anti-harassment training fostered a sexually hostile environment, then there is a basis of knowledge to anticipate that a measure requiring training might work to prevent harm.<sup>179</sup>

The proximate cause limitation of prophylaxis looks for an indirect cause and effect relationship between the affli-

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176. Cf. *United States v. Microsoft Corp.*, 253 F.3d 34, 105 (D.C. Cir. 2001) ("A court in both contexts [money damages and equitable relief] must base its relief on some clear 'indication of a significant causal connection between the conduct enjoined or mandated and the violation found directed toward the remedial goal intended.'").

177. See *infra* text accompanying notes 193-94 (discussing causal nexus required for consequential damages and reparative injunctions); see, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (imposing "rough proportionality" test as second prong of nexus test requiring "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development"); see also *Allen v. Wright*, 468 U.S. 737, 759 (1984) (denying standing in part because of the lack of causal nexus between the injury alleged of school desegregation and the defendants' conduct of failing to deny tax-exempt status to private schools discriminating on basis of race); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (holding that antitrust plaintiffs "must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury . . . that flows from that which makes defendants' acts unlawful"); PHILLIP AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES* 85 (5th ed. 1997) (describing nexus requirement of antitrust injury law as intended to evaluate whether the loss is connected closely enough with the remedial purpose of the antitrust laws).

178. BLACK'S LAW DICTIONARY 660 (7th ed. 1999) (defining "foreseeability" as "[t]he quality of being reasonably anticipatable").

179. See *Bundy v. Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981); *Neal v. D.C. Dep't of Corr.*, No. CIV.A93-2420, 1995 WL 517244, at \*3 (D.D.C. Aug. 9, 1995); *Women Prisoners v. D.C. Dep't of Corrs.*, 877 F. Supp. 634, 666 (D.D.C. 1994); see also *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 21 (1971) (tailoring prophylactic measures of gerrymandering districts, busing, and ratios to address location of schools that evidence showed in the past had been used as a potent weapon for creating or maintaining a state-segregated school system).

ated conduct and the harm.<sup>180</sup> Proximate cause in general is a concept that limits the wrongdoer's liability rather than imposing responsibility for every possible connected harm or consequence.<sup>181</sup> In the prophylactic remedy context, the proximate cause requirement limits the reach of judicial equity by restricting measures to those actions that might potentially protect against harm. The proximate cause limitation works prospectively to evaluate whether there is a potential causal link between the affiliated conduct and the harm. For example, in *Missouri v. Jenkins*,<sup>182</sup> the Supreme Court struck down a prophylactic measure increasing teacher salaries to make the public schools more attractive to white students who had fled the schools in order to ultimately desegregate the schools.<sup>183</sup> The Court held that the segregation had not caused the white flight and that the salary measures were simply too far removed from the harm to be an acceptable remedial means.<sup>184</sup> Similarly, in

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180. See BLACK'S LAW DICTIONARY 213 (7th ed., 1999) (defining "proximate cause" as "a cause that is legally sufficient to result in liability").

181. See *Graybill v. City of New York*, 247 F. Supp. 2d 345, 351-52 (S.D.N.Y. 2002) (using proximate cause notion to limit reach of Congress' 911 legislation for injuries resulting from or related to the terrorist attacks: "[P]roximate causation provides a useful framework for limiting the scope of that provision . . . . [T]he tort concept of proximate causation, . . . guides judges and juries in deciding how far a tortfeasor's liability stretches. Proximate causation limits a tortfeasor's liability to the expected, natural or foreseeable consequences of his or her wrongful conduct."); see also PROSSER AND KEETON ON THE LAW OF TORTS § 41, 264 (W. Page Keeton et al. eds., 5th ed. 1984) ("Proximate cause"—in itself an unfortunate term—is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct. In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts and would 'set society on edge and fill the courts with endless litigation.' As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.") (quoting *North v. Johnson*, 58 Minn. 242, 59 N.W. 1012 (1894)).

182. 515 U.S. 70, 94, 100 (1995).

183. *Id.*

184. *Id.* at 94-95, 100. The Court in fact suggested that the remedy of desegregation actually caused the white flight rather than the harm of racial segregation. *Id.* at 95 (citing the record in the liability phase of trial, and citing *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 491 (1995), which recognized that implementation of a desegregation remedy may result in white flight).

*Rizzo v. Goode*,<sup>185</sup> the Supreme Court invalidated injunctive relief imposed after instances of officer violence were proven at trial.<sup>186</sup> The Court struck down prophylactic measures ordering a civilian complaint procedure, new institutional policies, and departmental training where those measures addressed departmental conduct that was not shown to have contributed to the individual violations.<sup>187</sup> In *Cardenas v. Massey*,<sup>188</sup> the Third Circuit overturned prophylactic relief mandating the adoption of an anti-discrimination policy regarding race, because it would not have prevented future harm to the plaintiff who was no longer employed by the defendant.<sup>189</sup>

The nexus required for prophylactic measures is not a close or strict requirement.<sup>190</sup> For if the attendant conduct itself were so closely intertwined with the harm, it would likely constitute primary conduct directly causing the harm that would be subject to regular, rather than prophylactic, injunctive relief.<sup>191</sup> The nexus for prophylactic conduct must be something less than that connection which makes the conduct itself illegal in order to have a meaningful distinc-

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185. 423 U.S. 362 (1976).

186. *Id.*

187. *Id.* See also *Milliken v. Bradley*, 418 U.S. 717 (1977) (invalidating injunctive relief imposing prophylactic measures of busing on Detroit suburban school districts in order to cure white flight, because the suburbs were not involved in the educational segregation and therefore were not a proper target of the remedy).

188. 269 F.3d 251 (3d Cir. 2001).

189. *Id.* The case was not brought as a class action, and thus the policy relief could not be justified as a remedy to protect employees similar to the plaintiff. This lack of causal nexus can also explain the Court's decision in *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 435 (1976). The Court invalidated a reparative injunction requiring annual readjustment of racial composition of schools to address housing migration finding that the migration was not a resulting consequence of the segregation. In addition, a causal nexus sufficient for prophylactic relief was missing because housing was not determined to be an original contributing factor to the school segregation and thus would not be affiliated conduct that could be restricted to prevent a recurrence of the same harm. See *id.*

190. *Cf.* *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (rejecting strict test of exacting proportionality for nexus in takings law finding the constitution does not require such exacting scrutiny given the nature of the interests involved).

191. See, e.g., *Wittstock v. Mark A. Van Sile, Inc.*, 330 F.3d 899, 902 (6th Cir. 2003) (requiring a substantially close nexus between private actor and state actor in order to treat a private entity as the government for purposes of the state action doctrine in order to impose liability upon a private entity).

tion apart from other liability and remedies. Thus, it is sufficient to satisfy the nexus test if it is shown that the affiliated conduct sought to be included in the prophylactic order has a tendency or potential to facilitate the harm or its prevention.<sup>192</sup>

Such principles of limitation based on a sufficient causal link also apply to remedies designed to redress conduct and losses from the primary harm. In the corrective remedial contexts of consequential damages and reparative injunctions, courts have historically used principles of foreseeability, proximate causation, and remoteness to limit the reach of judicial relief.<sup>193</sup> Consequential damages are awarded to address the secondary losses occurring as a consequence of the demonstrated harm.<sup>194</sup> Historically, there was some skepticism about awarding such damages out of the concern over fabrication or windfall to the plaintiff.<sup>195</sup> Some limitations on consequential damages remain as a result of this concern, operating to deny such damages if they are unforeseeable, not proximately caused by the legal harm, avoidable by the plaintiff, too speculative, or too remote.<sup>196</sup> In general, though, the law has evolved to wide-

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192. *Cf. Dolan*, 512 U.S. at 391 (adopting an intermediate test for degree of relationship required under the nexus test of takings law, requiring a showing of a reasonable relationship between condition and purpose which is more than generalized statements but less than specific, exacting proportionality); *Brunswick v. Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86 (1977) (describing prophylactic provisions of the antitrust law as those which proscribe conduct that has a "tendency" or "potential" to cause certain harms).

193. *See Parker*, *supra* note 18, at 521 ("In short, the right-remedy test depends on a knowable and ascertainable proximate cause connection between the violation and its effects, but proximate cause is rarely a useful concept in public law litigation.").

194. *See DOBBS*, *supra* note 59, at 304; *see also LAYCOCK*, *supra* note 4, at 61 ("Consequential damages should refer to everything that happens to plaintiff as a result of this initial loss."); *but see Schonfeld v. Hilliard*, 218 F.3d 164, 176 (2d Cir. 2000) ("Special' or 'consequential' damages, on the other hand, seek to compensate a plaintiff for additional losses (other than the value of the promised performance) that are incurred as a result of the defendant's breach.").

195. *See generally Hadley v. Baxendale*, 156 ENG. REP. 145 (1854) (limiting recovery of consequential damages for breach of contract because lost profits of mill were not foreseeable).

196. *See DOBBS*, *supra* note 59, at 318-21 (discussing rules inhibiting recovery of consequential damages, including certainty, proximate cause, foreseeability, and avoidable consequences); *LAYCOCK*, *supra* note 4, at 63 (identifying limits on consequential damages of causation, foreseeability, and remoteness); *see also Roy Ryden Anderson, Incidental and Consequential Damages*, 7 J. L. & COMMERCE 327, 330 (1987) (stating that the requirements for recovering conse-

spread acceptance of consequential damages that are foreseeable by the defendant<sup>197</sup> and proximately caused by the harm.<sup>198</sup>

Similarly, reparative injunctive remedies, as discussed above, commonly address the consequences of past harm in order to prevent the continuation of that harm into the future.<sup>199</sup> The Court has used the notion of proximate cause to define the boundaries of proper reparative relief.<sup>200</sup> For ex-

quential damages under the UCC "include proving that the injury was foreseeable, that the loss was reasonably certain in amount and that the loss could not have been reasonably avoided by the aggrieved party"); see generally *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951 (7th Cir. 1982) (explaining the economic basis for the limitations on consequential damages).

197. Cf. *Centerline Inv. Co. v. Tri-Cor Indus.*, 80 S.W.3d 499, 503 (Mo. Ct. App. 2002) ("We agree with Centerline that including a provision for 'consequential' and 'any and all' damages in a lease broadens the scope of damages beyond those that are the 'natural and direct consequence' of the breach, but even consequential damages are limited. If consequential damage clauses were interpreted to allow recovery for 'any and all' damages, however remote, they would include damages entirely unimagined and unforeseeable by the parties and 'stretch infinitely in time.' The law has therefore limited consequential damages to those that are 'within the contemplation of the parties at the time of contracting, or 'foreseeable' to them.") (quoting DOBBS, *LAW OF REMEDIES* 228, 770 (2d ed. Hornbook Series, 1993)).

198. See U.C.C. § 2-715 (authorizing buyer's damages for losses proximately caused); *Caspe v. Aaacon Auto Transp., Inc.*, 658 F.2d 613, 617 (8th Cir. 1981) ("The general rule does not require the plaintiff to show that the actual harm suffered was the most foreseeable of possible harms. He need only demonstrate that his harm was not so remote as to make it unforeseeable to a reasonable man at the time of contracting.") (quoting *Hector Martinez & Co. v. S. Pac. Transp. Co.*, 606 F.2d 106, 110 (5th Cir. 1979)). However, the nomenclature of "consequential" damages still seems to connote the historical disfavor. See also *RESTATEMENT (SECOND) OF CONTRACTS* § 351 (requiring foreseeability to recover consequential damages); James M. Fischer, *UNDERSTANDING REMEDIES* 21 (1999) (distinguishing consequential damages that plaintiff must establish the causal relationship between the loss and the wrong from general damages that are presumed to follow inevitably from the wrong); LAYCOCK, *supra* note 4, at 63 ("[M]y own sense is that little of the traditional hostility to special or consequential damages remains. This is especially true in tort, but consequential damages are now much more likely to be awarded in contract as well."); Paul S. Turner, *Consequential Damages: Hadley v. Baxendale Under the Uniform Commercial Code*, 54 SMU L. REV. 655 (2001) (identifying the common practitioner definition of consequential damages as unforeseeable damages that are not recoverable). Thus, like prophylactic relief, remedies addressing secondary rather than direct harms still retain a pejorative label despite their wide acceptance in judicial practice.

199. See DOBBS, *supra* note 59, at 225; LAYCOCK, *supra* note 4, at 263.

200. See LAYCOCK, *supra* note 4, at 292; see, e.g., *Freeman v. Pitts*, 503 U.S. 467, 496 (1992) ("The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real



ample, in *Milliken v. Bradley*,<sup>201</sup> the Court upheld an injunction ordering remedial education for students from segregated schools, finding that their low academic performance was a consequence of the segregation.<sup>202</sup> At times, the Court has found this causation link to be easily satisfied through the use of presumptions,<sup>203</sup> while at other times it has required a more tangible basis for assessing the causal link. However, where the problem existing after a legal violation is shown not to be a result of the initial harm, such as where it is attributable to an intervening act, that problem is not a proper component of reparative relief. For example, in *Freeman v. Pitts*,<sup>204</sup> the Court terminated an injunction addressing post-harm residential segregation caused by intervening private housing migration rather than by the original *de jure* school segregation.<sup>205</sup> The reparative injunction cases thus illustrate the core principle that equitable remedies must be flexible to provide complete relief to the plaintiff, but that they, like consequential damages, cannot be limitless.

This same limitation of prophylaxis to reaching only causally linked conduct is also seen in the analogous area of

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that they have a causal link to the *de jure* violation being remedied."); *Milliken v. Bradley*, 418 U.S. 717, 745 (1974) (holding that remedy reaching non-party suburbs might be justified if the suburban school districts' acts caused racial segregation in the city); *Milliken v. Bradley*, 433 U.S. 267, 280-82 (1977) (*Milliken II*) (imposing remedy to address consequences caused by initial constitutional violation); see also Parker, *supra* note 18 (criticizing the Court's reliance on the proximate causation notion in constructing injunctive relief).

201. 433 U.S. 267 (1977).

202. *Id.* at 291; see also LAYCOCK, *supra* note 4, at 292 (discussing *Milliken* and its principle of injunctions addressing consequential harms).

203. Compare *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977) (requiring findings demonstrating that school segregation caused the effect or impact of citywide racial segregation in order to uphold system wide busing remedy), with *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979) (*Dayton II*) (using presumptions to conclude that residential segregation was a result of school segregation in few programs).

204. 503 U.S. 467 (1992).

205. See *id.* at 494 ("If the unlawful *de jure* policy of a school system has been the cause of the racial imbalance in student attendance, that condition must be remedied. The school district bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation. The findings of the District Court that the population changes which occurred in DeKalb County were not caused by the policies of the school district, but rather by independent factors, are consistent with the mobility that is a distinct characteristic of our society."); accord *Pasadena v. Spangler*, 427 U.S. 424, 435 (1976).

prophylactic legislation. The Supreme Court has limited prophylactic legislation to regulating legal conduct that has a sufficient causal nexus to the identified harm.<sup>206</sup> The Court's label for this nexus test in the prophylactic legislation context is "congruence and proportionality" and it mirrors in substance the test for properly tailored judicial prophylactic remedies.<sup>207</sup> Prophylactic legislation must be congruent, that is, it must have a corresponding or overlapping factual nexus with the identified harm.<sup>208</sup> And prophylactic legislation must be proportional in scope to the identified harm by reaching affiliated conduct only where that conduct has a sufficiently close causal link with the harm.<sup>209</sup> In other words, Congress must use appropriate remedial means to achieve its ends rather than simply using any and all means to achieve its legitimate goal.<sup>210</sup> For without this limitation upon the reach of the legislative remedy, Congress creates rather than remedies rights which are outside the scope of the Section 5 power.<sup>211</sup>

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206. See Thomas, *Remedial Rights*, *supra* note 33, at 727.

207. *E.g.*, *Bd. of Trs. v. Garrett*, 531 U.S. 356, 365 (2001); *City of Boerne v. P.F. Flores*, 521 U.S. 507, 520; *United States v. Morrison*, 529 U.S. 598, 625-26 (2000). Commentators have been confused by the apparent redundancy of the Court's "congruent and proportional" test and have attempted to provide more meaningful definitions for these terms by reference to legislative rather than remedial concepts. See Beck, *supra* note 156, at 429-30 ("Of course, in fairness to the Court, it may not have focused much on any precise conceptual distinction between these two components, instead wielding the phrase loosely to capture a set of interrelated and perhaps somewhat amorphous ideas about means-ends relationships. As a result, perhaps one should not push too hard to divine the precise and separable content of 'congruence' and 'proportionality' as used by the Court."); Caminker, *supra* note 150, at 1153.

208. Professor Beck describes the congruence test as requiring that the legislation actually be a means by which the end can be achieved. Beck, *supra* note 156, at 434.

209. Professors Caminker and Beck describe the proportionality requirement as requiring that the means be the appropriate size, shape, and necessary response to the identified end. See Beck, *supra* note 156, at 434; Caminker, *supra* note 150.

210. See *Morrison*, 528 U.S. at 625-26 ("[P]rophylactic legislation under § 5 must have a 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'") (quoting *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639 (1999)). *Contra* Caminker, *supra* note 150 (arguing that legitimate ends should justify the use of all rationally related means); Schoenbrod, *supra* note 5, at 672 (properly targeted prophylactic remedy justifies court's use of any and all remedial means to accomplish that purpose).

211. See *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997) ("There must be a congruence and proportionality between the injury to be prevented or remedied

The threshold factual nexus between the prophylactic measures and the legal violation was missing from the prophylactic legislation at issue in *Board of Trustees of the University of Alabama v. Garrett*.<sup>212</sup> The Supreme Court in *Garrett* invalidated the Americans with Disabilities Act ("ADA") as applied to state employers.<sup>213</sup> The factual nexus was missing because the ADA provisions imposing workplace rules for state employers of disabled employees did not relate to the legislative findings of workplace discrimination by non-state actors and discrimination by the state in the non-employment settings of public services and public accommodations.<sup>214</sup> As in *Lewis v. Casey*,<sup>215</sup> the prophylactic measures related to the subject matter only at the most general subject level—that is disability discrimination—and did not connect on the specific subject matter level by relating to the same actor of the state in the same context of employment.<sup>216</sup> Similarly, in *United States v. Morrison*,<sup>217</sup> the attempted prophylactic measures providing federal remedies for private domestic violence, related generally to the identified subject matter of gender discrimination, but failed to correspond to the subject matter of the Fourteenth Amendment which addresses discrimination by state rather than private actors.<sup>218</sup> The

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and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect."); see also Beck, *supra* note 156, at 411 ("If Congress regulates conduct far beyond the scope of any potential Fourteenth Amendment violations, a court may justifiably find the statute pretextual in that it aims at some end or object other than enforcement of Fourteenth Amendment rights.")

212. 531 U.S. 356 (2001).

213. *Id.* at 374.

214. *Id.* at 369-70, 371 n.7 (noting that while the congressional record contained many instances of general and historical discrimination against the disabled, few addressed the discriminatory activities of the state).

215. 518 U.S. 343 (1996).

216. See *Bd. of Trs. v. Garrett*, 531 U.S. 356, 371 n.7 (2001); *Lewis v. Casey*, 518 U.S. 343, 356-57 (1996) (holding that causal nexus between remedy and harm not met where both addressed general subject of prison legal assistance rather than specific issue of illiterate prisoner access to the courts). Cf. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (holding that nexus required for valid regulatory taking not met where general interest of enhancing the public's ability to traverse to and along the shorefront was disconnected from the permit condition requiring lateral public access along plaintiff's beachfront).

217. 529 U.S. 598 (2000).

218. *Id.* at 621, 625-26; Beck, *supra* note 156, at 435; Thomas, *Remedial Rights*, *supra* note 33, at 729-30.

Court held that the measures regulating the conduct of private perpetrators were not congruous with the discriminatory harm caused by state actors.<sup>219</sup>

In contrast, the required causal nexus was sufficiently established by Congress in enacting the Voting Rights Act, which outlawed literacy tests.<sup>220</sup> In *Katzenbach v. Moran*, the Supreme Court upheld the prophylactic legislation of the voting act because it addressed the legal conduct of literacy tests that were factually related to the states' racial discrimination denying minorities the right to vote.<sup>221</sup> While the Supreme Court had held literacy tests themselves to be permissible conduct,<sup>222</sup> Congress found that the state tests contributed to racial discrimination in voting and government services.<sup>223</sup> The *Katzenbach* Court upheld the prophylactic legislation proscribing the legal conduct of the tests because they were sufficiently connected with the discriminatory harm; legislative findings showed that the tests causally contributed to the denial of the right to vote and thus it was foreseeable that continued use of the test would facilitate more harm.<sup>224</sup>

Thus, the Court's prophylactic legislation jurisprudence reinforces the limiting principles of prophylactic remedies. Legislation can be prophylactic, in addition to being reparative or preventive, which allows Congress to go beyond the illegality itself to regulate permissible conduct in order to avoid future harm.<sup>225</sup> However, limitations upon the content and reach of prophylactic legislation are necessary to prevent remedial power from converting into a general legislative power.<sup>226</sup> As previously discussed, these same concerns

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219. See *Morrison*, 529 U.S. at 625-26.

220. See *Garrett*, 531 U.S. at 373 (contrasting invalid prophylactic legislation with the appropriate prophylactic legislation of the voting rights cases); *Morrison*, 529 U.S. at 626 (explaining that the Court upheld the prophylactic legislation in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), because it properly targeted the type of harm prohibited by the Fourteenth Amendment).

221. 384 U.S. 641, 652-53 (1966); see also *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding prophylactic measures of prohibiting literacy test pursuant to remedial power of the enforcement clause of the Fifteenth Amendment).

222. See *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959).

223. See *Katzenbach*, 384 U.S. at 653.

224. *Id.*

225. See *Garrett*, 531 U.S. at 365.

226. See *supra* note 33 and accompanying text.

of extrinsic assertions of power dominate the analysis of judicial prophylactic remedies. In both cases, the doctrinal limitations of the reach of prophylaxis are designed to confine the actor to the limited scope of its constitutionally-designated power, while at the same time facilitating the flexibility necessary to remedy modern and more complex wrongs and legal problems.<sup>227</sup>

## II. JUDICIAL DISCRETION AND THE CHOICE OF PROPHYLACTIC RELIEF

Broad equitable remedies like prophylaxis often trigger concerns that judges, in imposing such relief, are overstepping their authority by injecting their own personal views of right and wrong into the case.<sup>228</sup> The reality of the process by which prophylactic remedies are chosen for a particular case, however, defies this portrayal of arbitrary remedial decisionmaking. Judges choose prophylactic remedies not as a default, but as a less restrictive alternative to other relief.<sup>229</sup> Defendants are given the first opportunity to craft their own solution to the legal problem or the courts will initially impose the less restrictive alternative of a negative, preventive injunction.<sup>230</sup> It is only where those other remedies of private resolution and limited intrusion fail that courts then turn to the more precise and powerful remedial weapon of prophylaxis. Judges carefully craft the prophylactic measures based on the evidence and argumen-

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227. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000) ("Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation."); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, at 31 (1971) (upholding prophylactic relief and suggesting that the Court "sought to suggest the nature of limitations without frustrating the appropriate scope of equity"); Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978).

228. See *Mishkin*, *supra* note 78, at 960 ("The judge's attention is focused on what he sees as an evil. He is at the same time offered a proposal for action which promises to cure that evil. He is in a position to command the implementation of that proposal (or some other to the same end), and he feels that he ought to use his power to the end of remedying the perceived evil. . . . [R]ecognizing the validity and strength of these feelings, and of the commendable personal desire to act against a perceived evil, is not the same as accepting them as a legitimate basis for a federal court to exercise its power. Appointment as a federal judge does not, to use the classic phrase, confer "a roving commission to do good.").

229. See *infra* Part II.A.

230. See *infra* text accompanying notes 238-43.

tation presented during the case.<sup>231</sup> As in any decisionmaking process, judges may rely on the parties, experts, evidence or legal precedent to formulate a decision as to the appropriate remedy.<sup>232</sup> Courts that impose prophylactic remedies without following this cautious and restrained approach may have their orders invalidated as an abuse of equitable power.<sup>233</sup>

### *A. Prophylaxis as the Least Restrictive Alternative*

As explained thus far, the prophylactic remedy has tremendous power to prevent harm by addressing affiliated conduct with specific, enforceable measures.<sup>234</sup> The remedy, however, poses the inherent risk of unnecessarily regulating defendants' behavior. Unlike all other remedies, prophylaxis directs defendants' legal conduct that contributes to rather than violates the law.<sup>235</sup> The restriction of attendant conduct then must be necessary for valid remedial purposes such as effective enforcement, as we have seen. Moreover, courts are cautious in imposing this remedy and do so only after considering other options. Thus while courts have not articulated a standard that prophylaxis must be demonstrated to be the least restrictive alternative, in practice, the remedy has been applied only when it is crafted in the least restrictive manner and more permissive alternative remedies are not available.<sup>236</sup> The Court's shorthand for this cautious use of prophylactic relief reiterated in the school desegregation and prison cases is that "the federal courts in devising a remedy must take into account

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231. See *infra* Part II.B.

232. See *infra* text accompanying notes 293-306.

233. See Thomas, *Prophylactic Remedies*, *supra* note 1, at 391-92, 394-96 (arguing that prophylactic remedy imposed as remedy of first choice, in the absence of defendant input or defiance, constituted an abuse of discretion).

234. See *supra* Part I.A-B.

235. See Schoenbrod, *supra* note 5, at 629 (stating that the use of equitable discretion to order prophylactic remedies effectively enforces plaintiffs' rights, "but takes away the defendant's right to engage in perfectly legal conduct").

236. And thus courts have interpreted the Prison Litigation Reform Act's requirement that prospective relief ordered in a prison conditions case be the "least restrictive necessary" as still permitting the continued use of prophylactic relief. See, e.g., *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001).

the interests of state and local authorities in managing their own affairs, consistent with the Constitution."<sup>237</sup>

The first evidence of caution and consideration of the defendants' interests is the developed rule that courts must give defendants the first opportunity to avoid the harm.<sup>238</sup> Courts assessing the necessity for prophylactic relief must give the defendants the first opportunity to propose their own remedy for the harm once a finding of a legal violation has been made.<sup>239</sup> The Supreme Court in *Lewis v. Casey* emphasized that this consideration is a requirement of the remedial process, and not a mere notion of deference.<sup>240</sup> Accordingly, eight Justices concurred that a critical defect in the case that would have alone justified reversal was the trial court's failure to give the state prison defendants the first opportunity to remedy the harm.<sup>241</sup> Such a judicial step relies upon the significant expertise of the defendant in managing its own organization, and provides significant respect for the autonomy and self-governance of the defendant in recognition of separation of powers concerns.<sup>242</sup> Thus, it is the common practice of district courts to initially approve the defendants' remedial plans.<sup>243</sup>

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237. *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977); *See also Missouri v. Jenkins*, 495 U.S. 33 (1990) ("one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions"); *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977) ("We all understand, of course, that federal courts have no authority to address state officials out of office or to fire state employees or to take over the performance of their functions. Most assuredly, however, in proper cases a federal court can, and must, compel state officials or employees to perform their official duties in compliance with the Constitution of the United States.").

238. *See Bounds v. Smith*, 430 U.S. 817, 818 (1977); *Lewis v. Casey*, 518 U.S. 343, 362 (1996).

239. *See Lewis*, 518 U.S. at 362, 393 (Souter, J., concurring in part and dissenting in part); *see also Jenkins v. Missouri*, 639 F. Supp. 19, 26-33 (W.D. Mo. 1985), *aff'd*, 807 F.2d 657 (8th Cir. 1986).

240. *Lewis*, 518 U.S. at 362-63, 393, 398.

241. *Id.*

242. *See id.* at 361-63, 398.

243. *See Parker*, *supra* note 18, at 494-95 (describing how the district court approved the defendants' plans in *Jenkins v. Missouri*, 639 F.Supp. 19 (W.D. Mo. 1985), with little change). However, courts evaluate the efficacy of the defendants' remedial proposal and do not simply rubber stamp their plan. *See, e.g., Anderson v. Redman*, 429 F. Supp. 1105, 1125 (D. Del. 1977) (evaluating defendants' remedial proposal for unconstitutional prison conditions and finding that "these proposals by the State represent an important initial step toward ameliorating the present conditions at DCC. If the State, however, is

Only where defendants fail to propose or effectuate an adequate remedy is the court able to impose expansive prophylactic relief.<sup>244</sup> Indeed, where the defendants fail to fashion an adequate remedy or comply with their own plan, the courts find a heightened need and stronger basis for awarding prophylactic relief.<sup>245</sup> Accordingly, in the prison case of *Hutto v. Finney*, the district court gave the prison defendants two chances to devise their own plan for remedying the constitutional violations.<sup>246</sup> The defendants' failure to implement a remedial plan or to make any substantial progress on curing the harm then provided the basis for the district court, and subsequently the Supreme Court, to authorize prophylactic relief.<sup>247</sup> The Court held:

In fashioning a remedy, the District Court had ample authority to go beyond earlier orders and to address each element contributing to the violation. The District Court had given the Department repeated opportunities to remedy the cruel and unusual conditions in the isolation cells. If petitioners had fully complied with the court's earlier orders, the present time limit might well have been unnecessary. But taking the long and unhappy history of the

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suggesting that any remedy for its violations of State law should be predicated upon its long range plans for building a new 48 bed maximum security facility and a new 300 bed facility, its position is untenable for several reasons.”).

244. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (“Remedial judicial authority does not put judges automatically in the shoes of the school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.”); see also William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 695-97 (1982) (concluding that courts should supplant state and local government only to the extent that those governments have demonstrated that they cannot be trusted to remedy the wrong).

245. See *Swann*, 402 U.S. at 16 (“In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system.”); *id.* at 24 (noting that the school board had totally defaulted in its acknowledged duty to come forward with an acceptable remedial plan of its own, despite the patient efforts of the judge who on at least three occasions urged the board to submit plans).

246. *Hutto v. Finney*, 437 U.S. 678 (1978) (“After finding the conditions of confinement unconstitutional, the District Court did not immediately impose a detailed remedy of its own. Instead, it directed the Department of Correction to ‘make a substantial start’ on improving conditions and to file reports on its progress . . . . When the Department’s progress proved unsatisfactory, a second hearing was held . . . . Again the court offered prison administrators an opportunity to devise a plan of their own for remedying the constitutional violations, but this time the court issued guidelines, identifying four areas of change that would cure the worst evils.”).

247. *Id.* at 687.



litigation into account, the court was justified in entering a comprehensive order to insure against the risk of inadequate compliance.<sup>248</sup>

Second, courts carefully assess the viability of other alternative relief before crafting their own protective measures.<sup>249</sup> Prophylaxis is not generally the default remedial decision.<sup>250</sup> Rather, it is commonly applied in an incremental manner, with the judge at each step of the case adding more specific measures as needed.<sup>251</sup> Such incremental relief is needed where defendants have evaded a prior, less-restrictive prohibitory injunction.<sup>252</sup> For example, in the abortion protest case of *Madsen*, the trial court first enjoined the defendant protestors from blockading or blocking access to the abortion clinic.<sup>253</sup> When the defendants failed to comply with that order, the court then crafted specific prophylactic measures to address the facilitators of the harm.<sup>254</sup> Similarly, in the school desegregation cases, the Court first ordered the defendants to change the segregated school sys-

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248. *Id.*

249. See Landsberg, *supra* note 2, at 930 (concluding that prophylactic rules "provide a maximum remedy in cases where simple prohibitory rules are likely to fail").

250. See *O'Shea v. Littleton*, 414 U.S. 448, 504 (1974) (denying prophylactic measure of prohibiting all state criminal prosecutions to remedy unconstitutional racially-motivated prosecutions because of "the availability of other avenues of relief open to respondents for the serious conduct they assert," including recusal of the judge, change of venue, sanction of the judge, post-conviction appellate review, or federal habeas relief); FISS, *supra* note 65, at 14 (describing the first decade of school desegregation remedies of the general structural command giving way to the specific prophylactic remedies of the second *Brown* decade in which courts began writing specific plans to cope with the absence of good faith on part of defendants to comply with the prior orders).

251. See, e.g., Justice Speech, *supra* note 14, 7-8.

252. See FISS, *supra* note 65, at 36 (describing the gradualism of the conversion of a generalized structural injunction into a specific prophylactic order: "The usual scenario in the structural context is for the judge to issue a decree (perhaps embodying a plan formulated by the defendant), to be confronted with disobedience, and then not to inflict contempt but to grant a motion for supplemental relief. Then the cycle repeats itself. In each cycle of the supplemental relief process the remedial obligation is defined with greater and greater specificity.").

253. *Operation Rescue v. Women's Health Ctr., Inc.*, 626 So.2d 664, 667 n.4 (Fla. 1993), *aff'd in part, rev'd in part sub nom. Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994).

254. *Id.* at 669.

tem<sup>255</sup> and then to create a racially unified school system.<sup>256</sup> It was only when those two general orders failed to achieve results that the courts turned to the specific prophylactic measures of requiring busing, quotas, and redistricting.<sup>257</sup> Thus, the prior default of the defendant in failing to conform to a less restrictive injunction is a strong case for the imposition of prophylactic relief.<sup>258</sup>

However, where the defendants have not violated prior orders or laws, alternative less restrictive remedies should be considered prior to the imposition of prophylactic measures. For example, in the school desegregation case of *People Who Care* the court invalidated a prophylactic measure forbidding the school district from tracking students by grouping students by ability.<sup>259</sup> While there was some evidence that the school may have used tracking to segregate white and black students, the court held that a lesser restrictive prophylactic measure was required.<sup>260</sup> Thus, the

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255. See *Brown v. Bd. of Educ.*, 349 U.S. 249, 301 (1955) (ordering preventive, structural relief requiring defendants to "admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases").

256. See *Green v. County Sch. Bd.*, 391 U.S. 430, 437-38 (1968) (ordering reparative, structural relief requiring the defendants to "take whatever steps necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch").

257. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16, 26 (1971) (ordering prophylactic relief because of "the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty" and the court's broad power to fashion a remedy that will assure a unitary school system "in default by the school authorities of their obligation to proffer acceptable remedies").

258. See *Fletcher*, *supra* note 244, at 637. "[R]emedial discretion in institutional suits is inevitably political in nature" and therefore "presumptively illegitimate" except when political bodies that should ordinarily exercise such discretion are "seriously and chronically in default" in which case judicial discretion is a "necessary" and "legitimate" substitute. *Id.*

259. 111 F.3d 528, 536 (7th Cir. 1997).

260. *Id.* ("Were abolition of tracking the only means of preventing the school district from manipulating the tracking system to separate races, it might be a permissible remedy. It is not the only way—as we take the plaintiffs implicitly to concede by accusing the school district of having placed white kids in higher tracks, and black kids in lower tracks, without always complying rigorously with objective criteria, such as scores on achievement tests. If that is the wrong, the remedy is obvious: forbid the district, on pain of contempt if the prohibition is flouted, to track students other than in accordance with criteria that have been validated as objective and nonracist. This form of remedy is not only proportioned to the violation and duly respectful of the autonomy of educators in

court could forbid the district from tracking students other than in accordance with criteria validated as objective and non-racist, but could not impose a blanket prohibition on the useful educational measure of tracking.<sup>261</sup>

The failure to use prophylaxis appropriately as a fall-back rather than a remedial starting point ultimately leads to claims of unfettered judicial activism as it did in *Bush v. Gore*.<sup>262</sup> In the famous election case of 2000, the Supreme Court reacted to the unconstitutional recount ordered by the Florida Supreme Court by immediately imposing its own prophylactic remedy in the form of a four-part process for a state recount.<sup>263</sup> Then, finding that there was insufficient time actually to comply with these prophylactic measures, the Court halted any and all recounts in the election.<sup>264</sup> This quick and dramatic default to prophylactic relief raised universal criticism<sup>265</sup>—which should be expected when a court fails to follow a more cautious approach to imposing prophylactic relief. In *Bush v. Gore*, the Supreme Court did not consider less restrictive alternatives such as the preventive relief of prohibiting the arbitrary recount or the reparative relief of requiring the Florida court to correct the infirmities of its unconstitutional recount.<sup>266</sup> Instead, the Court jumped to its own control of the Florida

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matters educational; it also requires less administrative supervision by the special master . . .").

261. *Id.* at 536.

262. See Thomas, *Prophylactic Remedies*, *supra* note 1, at 387-407.

263. *Bush v. Gore*, 531 U.S. 98, 110 (2000) (per curiam). The Court ordered: (1) the adoption of adequate statewide standards for determining what constitutes a "legal vote" after opportunity for argument; (2) practicable procedures to implement the standards; (3) orderly judicial review of any disputed matters; and (4) evaluation of the accuracy of vote tabulation equipment by the Florida Secretary of State. *Id.*

264. *Id.*

265. See Ward Farnsworth, "To Do a Great Right, Do a Little Wrong": A User's Guide to Judicial Lawlessness, 86 MINN. L. REV. 227, 264 (2001) (concluding that the Court's remedial decision was "lawless" in that it "lacked an adequate legal foundation by traditional standards"); Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. CHI. L. REV. 657, 660 (2001) (finding the Court's remedial decision "unsettling" and incorrect as a matter of law); Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 767 (2001) (calling the *Bush v. Gore* remedy a "blunder" and the most difficult part of the opinion to defend on conventional legal grounds); Thomas, *Prophylactic Remedies*, *supra* note 1, at 387-401 (arguing that the remedial decision in *Bush v. Gore* was an abuse of discretion under applicable principles of equitable relief).

266. See Thomas, *Prophylactic Remedies*, *supra* note 1, at 391-98.

election system without any evidence of the ineffectiveness of other less restrictive alternatives.<sup>267</sup>

Finally, but perhaps most importantly, any court that imposes a prophylactic remedy must assess the inherent danger of prophylactic remedies of improperly restricting legal conduct. The burden to the defendant from the injunctive relief is a typical factor used by courts in evaluating the propriety and scope of injunctive relief.<sup>268</sup> Courts want to ensure that their own remedies do not restrict protected conduct, cause economic waste, or otherwise create unfairness. For the courts recognize that defendants obviously have an interest in continuing to engage in permissible conduct without the restriction of the court. Thus, the Supreme Court repeatedly has stated that in crafting injunctive remedies, courts owe special deference to public institutional defendants.<sup>269</sup> Sometimes this deference results in the invalidation of prophylactic measures.<sup>270</sup> However, the deference principle is not a prohibition on regulating legal conduct through prophylaxis.<sup>271</sup> Instead, the deference

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267. *Id.*

268. To qualify for injunctive relief, courts must consider the undue burden to the defendant from the imposition of the injunction. See DOBBS, *supra* note 59, at 228; LAYCOCK, *supra* note 4, at 282-89. In the context of broad equitable relief, the Supreme Court has reiterated that the interests of the defendants must be given proper deference. See also *Lewis v. Casey*, 518 U.S. 343, 361-62 (1996).

269. See *Rizzo v. Goode*, 423 U.S. 362, 378-79 (1976) ("When a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with the 'well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs.'") (citations omitted). See also *Bd. of Educ. v. Dowell*, 498 U.S. 237, 248 (1991); *Freeman v. Pitts*, 503 U.S. 467, 489 (1992) (local public education); *Lewis v. Casey*, 518 U.S. 343 (1996) (deferring to defendant prison officials); *Missouri v. Jenkins*, 515 U.S. 70, 102 (1995) (importance of local control over public education).

270. See *O'Shea v. Littleton*, 414 U.S. 448, 502 (1974) (denying injunction prohibiting all state criminal prosecutions against plaintiffs to address harm of racially-motivated state prosecutions on the basis that "such a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings is in sharp conflict with the principles of equitable restraint which this Court has recognized in the decisions previously noted").

271. Although, Justices Scalia and Thomas perhaps would argue to the contrary that courts cannot regulate any institutional conduct other than the primary conduct directly causing the harm. See *Lewis*, 518 U.S. at 357 (1996) (Scalia, J.) ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."); *id.* at 385

suggests a level of caution that serves to tailor and limit rather than to preclude the prophylactic remedy.

The biggest threat from prophylactic remedies comes from measures that restrict affiliated conduct that is not only legal, but also protected behavior. For example, in the abortion protest cases of *Schenck* and *Madsen*, the Court parsed through the lower courts' prophylactic measures to ensure that they did not unduly restrict legal conduct protected by the First Amendment.<sup>272</sup> In both cases, the Court struck down prophylactic measures that restricted not merely legal conduct of the defendant protestors, but constitutionally-protected conduct under the First Amendment.<sup>273</sup> Due to the heightened protection accorded the legal conduct, the Court in *Madsen* invalidated prophylactic measures such as a ban on signs and protests at private homes and tailored other measures that were not necessary to achieve the protection from harm.<sup>274</sup> The *Schenck* trial court subsequently attempted to fashion a prophylactic preliminary injunction to restrain the same type of abortion protesting while circumventing the problems identified in the *Madsen* decree.<sup>275</sup> Again, though, the Supreme Court struck down some prophylactic measures as overly restrictive of defendants' legal and constitutionally protected conduct.<sup>276</sup> While such prophylactic measures were appropriate given

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(Thomas, J., concurring); see also *Missouri v. Jenkins*, 515 U.S. 70, 114 (1995) (Thomas, J., concurring).

272. See *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994); cf. *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002) (upholding constitutionality of municipal park ordinance requiring individuals to obtain permit before conducting more-than-50-person events: "The prophylaxis achieved by insisting upon a rigid, no-waiver application of the ordinance requirements would be far outweighed, we think, by the accompanying senseless prohibition of speech (and of other activity in the park) by organizations that fail to meet the technical requirements of the ordinance but for one reason or another pose no risk of the evils that those requirements are designed to avoid.").

273. See *Schenck*, 519 U.S. at 357; *Madsen*, 512 U.S. at 753.

274. *Madsen*, 512 U.S. at 771 (tailoring buffer zone to reach only clinic rather than private property); *id.* at 773 (invalidating ban on images and signs observable in clinic); *id.* at 775 (invalidating blanket ban on picketing at employee residents finding that narrower time, place or manner restriction would have accomplished the desired result).

275. See *Pro-Choice Network of W.N.Y. v. Project Rescue W.N.Y.*, 799 F. Supp. 1417 (W.D.N.Y. 1992).

276. See *Schenck*, 519 U.S. at 866-67 (striking down "floating buffer zones" prohibiting protestors from approaching within fifteen feet of individuals).

the volatility of the protest conflict, the measures were still required to be carefully tailored so as not to impinge on the protestors' legal rights to free speech.<sup>277</sup>

Thus, the reality of prophylaxis belies the scholarly spin that such remedies are disrespectful of the institutional concerns of public defendants. Instead, the case law demonstrates how prophylaxis is used only where necessary. Defendants are given the first opportunity to remedy that harm. If a court remedy is required, the court carefully considers less restrictive remedial options other than prophylaxis. Once the court selects prophylaxis, it carefully tailors each aspect of its prophylactic measures to respect the ability of the defendant to engage in legal conduct that facilitates harm. At each step of the remedial process, defendants are given priority in the creation and tailoring of the prophylactic remedy. Such remedial favoritism in favor of defendants, the wrongdoers, has led Professor Wendy Parker to accuse the judicial system of ceding too much remedial power to the defendants at the expense of plaintiffs' rights.<sup>278</sup> Thus, what is apparent from an examination of the prophylactic measures that have withstood challenge is that they restrict defendants' legal conduct only as a last remedial resort.<sup>279</sup>

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277. *Id.* at 867 ("[W]e have before us a record that shows physically abusive conduct, harassment of the police that hampered law enforcement, and the tendency of even peaceful conversations to devolve into aggressive and sometimes violent conduct.").

278. *See* Parker, *supra* note 18, at 479 (calling for courts to more carefully define the right and recognize their own remedial abilities in order to counter the current Supreme Court approach to school desegregation and public law remedies that cedes too much remedial power to the defendants thereby preventing lower court judges from undertaking principled, well-grounded public law remedies). *See also* Parker, *supra* note 79.

279. *See* FISS, *supra* note 65, at 13 ("With the structural injunction the story is more complicated: over time the decreed act becomes more and more specific, for example, detailing the dates on which choice forms are to be distributed, the ratio of blacks and whites in each school, the amount to be spent on books, etc. But this specificity emerges as a last resort. The original impulse in these structural cases was just the opposite—to use almost no specificity in describing the act required.").

### B. *Crafting Prophylaxis in the Remedial Decisionmaking Process*

A practical, yet important question is *how* the judge formulates the specific measures that will constitute the prophylactic remedy. The standard assumption is that there is no process or criteria used to craft prophylaxis, but rather that the decree results out of whole cloth based on the judge's own personal view of how best to resolve the case.<sup>280</sup> Such perceived indeterminacy and arbitrariness feeds the claims of the illegitimacy of prophylactic relief. However, the reality is that the courts, in crafting prophylactic measures, simply employ the traditional adjudicatory process and decisionmaking to make the remedial decision.<sup>281</sup> The court conducts hearings, orders briefings, receives evidence, and appoints experts as necessary to gather the facts relevant to deciding the remedial question of what facilitators to address in prophylactic relief.<sup>282</sup> The prophylactic measures are not judge invented, but rather

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280. See LASSER, *supra* note 8, at 222-43 (describing the Reagan-era criticisms of the Supreme Court cases involving desegregation, criminal procedure, prisons, voting, etc. as a "jurisprudence of idiosyncrasy" unrestrained by anything but the judges' own policy preferences). See also Diver, *supra* note 12, at 62 ("First, a remedial decree is a complex and contingent exercise in prediction. It calls for speculation about the behavior of individuals and human institutions under conditions of unusual stress—judgments likely to be based more on 'feel,' on the ineffable deposit of experience, than on objectively verifiable evidence."); Justice Speech, *supra* note 14, at 7 ("Where I am most accused of activism is with respect to the broad and comprehensive remedies that I have ordered in institutional reform cases. Some say that I have usurped the power of the state legislature, meddled in areas beyond the expertise of the court, and imposed my own philosophy and sociological conclusions. I disagree wholeheartedly with these allegations, and I would move to quash the indictment."); Mishkin, *supra* note 71, at 960-65.

281. See Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273 (1995); Parker, *supra* note 79, at 1623. Cf. Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980); Justice Speech, *supra* note 14, at 7 ("When properly practiced, remedial activism is completely consistent with the obligation of a district court judge to determine the existence of constitutional injuries and impose appropriate remedies based upon the evidence adduced in the case.").

282. See Justice Speech, *supra* note 14, at 7 ("the adversarial nature of the judicial process—particularly the consideration of the testimony of expert witnesses—enables the court to order remedies that are neither arbitrary, tyrannical, nor the products of its own imagination, but rather remedies that flow logically from the court's findings in the case.").

judge incorporated from the existing record. As Judge Justice of the Eastern District of Texas stated in describing his process for adopting prophylactic and structural remedies in prison litigation cases: "I created none of this out of whole cloth. Rather, the facts of the case and the testimony of eminent experts supported the necessity of each and every step to remedy the clearly established constitutional violations."<sup>283</sup> The important reality is that judges are limited in crafting prophylactic relief to the evidence presented in the record, and thus are generally precluded from basing these remedies on matters external to the case.<sup>284</sup>

Academics, however, have missed the reality of the routine adjudication of remedies.<sup>285</sup> Since the advent of prophylactic relief, it has been suggested by scholars that remedial decisionmaking of a public nature cannot be done within the traditional adjudicatory process, but rather requires a specialized remedial process.<sup>286</sup> The assertion is that legal claims pertaining to the broader public interest

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283. *Id.* at 8-9.

284. See *Anderson v. Redman*, 429 F. Supp. 1105, 1124 (D. Del. 1977) ("Those same individuals testified housing classification becomes impeded unless eight to ten percent of the beds used for permanent housing of convicted inmates are not occupied. Accordingly, the aggregate existing and future design capacity of DCC will be reduced by eight percent to determine the maximum capacity of DCC before classification to housing becomes impeded."); see also *Hamilton & Schoenbrod*, *supra* note 33, at 486 (discussing how judges imposing prophylactic remedies are limited by the record built by the parties, evidentiary rules, and the requirement to base its findings supporting prophylactic relief upon the record).

285. See *Bone*, *supra* note 281, at 1275 (arguing that the dichotomy between private and public law litigation has been mischaracterized and misunderstood); *Parker*, *supra* note 79, at 1627 (calling into serious question the public law model of litigation in which the judge acts in an atypical, activist manner).

286. See *Susan P. Sturm, A Normative Theory of Public Law Remedies*, 79 *GEO. L. J.* 1355 (1991) (proposing a specialized deliberative process akin to mediation to resolve public law remedies); *Diver*, *supra* note 12, at 63 ("Adjudication is not well suited to such an enterprise. Its logic seeks to cast the multipolar, shifting relationships in institutions into a static and precisely defined conflict. It looks for an optimal, comprehensive, and final solution rather than an incremental, continual adjustment of interests. The adjudicatory model demands objective verifiability, not instinctive feel. It treats institutions as intelligent, organic actors capable of implementing rational objectives through consistent patterns of behavior, and it relies on the invocation of authority and the threat of coercive sanctions to induce changes in behavior."); *Lon Fuller, The Forms and Limits of Adjudication*, 92 *HARV. L. REV.* 353 (1978) (arguing that polycentric problems of public nature are not suit to resolution in the bipolar legal dispute process).



require a "consensus-based" process allowing participation by multiple stakeholders and policy decisions that fall outside the judicial realm.<sup>287</sup> In other words, advocates argue that public law solutions require alternative dispute resolution rather than traditional adjudication.<sup>288</sup>

It is certainly true that crafting legal remedies is quintessential "problem solving" and thus effectively, and perhaps most effectively, can be done through Alternative Dispute Resolution ("ADR").<sup>289</sup> However, that is true in each and every case: ADR allows parties in all cases to have self-determination, participation, knowledge, and result maximization that often is missing from the litigation process.<sup>290</sup> The reality is that ADR does not always succeed. Parties fail to reach a settlement, defendants fail to comply with an agreement,<sup>291</sup> or the plaintiff believes that a court judgment can better protect her rights.<sup>292</sup> In the absence of a private agreement, judges are charged with crafting a remedy to

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287. See Sturm, *supra* note 286, at 1357.

288. *Id.*; see also Molly Townes O'Brien, *At the Intersection of Public Policy and Private Process: Court-Ordered Mediation and the Remedial Process in School Funding Litigation*, 18 OHIO ST. J. ON DISP. RESOL. 391 (2003). But see OWEN FISS, *THE LAW AS IT COULD BE* 90-104 (2003) (reprinting *Against Settlement*, 93 YALE L.J. 1073 (1984), and arguing strongly against the use of ADR to resolve public law litigation).

289. See Minow, *supra* note 9 (describing use of mediation, early neutral evaluators); O'Brien, *supra* note 288, at 394 (arguing that Ohio school funding case could best be resolved through a complex mediation process involving multiple stakeholders and occurring after the judicial determination of core rights).

290. See LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 2 (2d ed. 1997).

291. See, e.g., *United States v. Microsoft*, 97 F. Supp. 2d 59 (D.D.C. 2000) (failing to reach settlement through negotiation or court-ordered mediation after liability determination finding that defendant corporation violated the antitrust laws).

292. See Judge Harry Edwards, *Alternative Dispute Resolution: Panacea or Anathema?* 99 HARV. L. REV. 668, 676 (1986) (stating there is "real reason for concern" if ADR is extended to resolve difficult issues of constitutional or public law by making use of non-legal values to resolve important social issues or allow public officers to avoid their duties and obligations); Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984) (arguing that settlement is not generally preferable to a judicial decision); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L. J. 1545 (1991) (arguing that mediation, and particularly mandatory mediation, is harmful to women in divorce and domestic violence cases); Judith Resnick, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 545 (1986) ("Adjudication is far from perfect. But what it offers is decisionmaking by government-empowered individuals who have some accountability both to the immediate recipients of the decisions and to the public at large.").

respond to the established violation. Thus, ultimately, courts must be able to formulate reasoned decisions as to appropriate prophylactic relief in a given case.

In order to collect the information necessary to crafting prophylactic relief, the court utilizes the same adjudicatory process used in every case to determine questions of fact and liability and remedies such as damages.<sup>293</sup> Courts deciding whether and how to craft prophylactic relief rely upon hearings, arguments, briefs, evidence, witnesses and experts to assess the relevant facts and law.<sup>294</sup> The remedial decision is generally rendered following a bifurcated phase of the trial devoted to hearing evidence and argument about the remedial question whether the remedy sought is an injunction or damages.<sup>295</sup> In chastising the *Microsoft* district court for failing to conduct such a remedial hearing, the appellate court reiterated the important adjudicatory requirements of remedial decisionmaking:

The District Court's remedies-phase proceedings are a different matter. It is a cardinal principle of our system of justice that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings. Any other course would be contrary to the spirit which imbues our judicial tribunals prohibiting decision without hearing. A party has the right to judicial resolution of disputed facts not just as to the liability phase, but also as to appropriate relief. Normally, an evidentiary

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293. See *United States v. Microsoft*, 253 F.3d 34, 101-02 (D.C. Cir. 2001) ("But a prediction about future events is not, as a prediction, any less a factual issue."); *United States v. Microsoft*, 97 F. Supp. 2d 59, 62 (D.D.C. 2000), *vacated by* 253 F.3d 34 (D.C. Cir. 2001); Parker, *supra* note 79.

294. See Fletcher, *supra* note 244, at 656-57 (discussing the typical litigation tools judges use to make an informed decision about issuing affirmative injunctions including testimony, hearings, special masters, intervenors, and amicus briefs). For example, in *Women Prisoners v. D.C. Dep't of Corrs.*, 877 F. Supp. 634 (D.D.C. 1994), this author, as one of the counsel for plaintiffs in the case, presented evidence on the remedy issue through expert testimony, expert reports, document evidence, and demonstrative evidence during the liability phase of the trial.

295. See *Schenck v. Pro-Choice Network*, 519 U.S. 357, 365-66 (1997) (indicating trial court conducted twenty-seven days of hearings regarding compliance with temporary injunction and proper scope of preliminary relief); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 7 (1971) (indicating district court held numerous hearings and received voluminous evidence as to prophylactic remedy for school desegregation). See also *Hart v. Comty. Sch. Bd. of Brooklyn*, 383 F. Supp. 769, 769-70 (E.D.N.Y. 1974); *People Who Care v. Rockford Bd of Educ.*, 111 F.3d 528, 533 (7th Cir. 1997) (conducting designated hearings for remedial phase of school desegregation case).

hearing is required before an injunction may be granted. . . . Other than a temporary restraining order, no injunctive relief may be entered without a hearing. *See generally* Fed. R. Civ. P. 65. A hearing on the merits—i.e., a trial on liability—does not substitute for a relief-specific evidentiary hearing unless the matter of relief was part of the trial on liability, or unless there are no disputed factual issues regarding the matter of relief.<sup>296</sup>

In these supplemental remedial proceedings, the attorneys for the plaintiffs present their remedial demands and the defendants present their denial or counter-demands for appropriate relief.<sup>297</sup> The plaintiffs initially frame the context of potential relief, often placing a particular remedy up for debate or excluding a remedy from the range of potential options.<sup>298</sup> Defendants present their own interests as to the specific remedies proposed, including cost and implementation concerns.<sup>299</sup> Initially, these interests of the defendants are given presumptive weight as the court gives the defendants the first opportunity to remedy the violation independently.<sup>300</sup> The parties' experts present evidence and tes-

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296. *United States v. Microsoft*, 253 F.3d 34, 101 (D.C. Cir. 2001). *See Women Prisoners v. D.C. Dep't of Corrs.*, 877 F. Supp. 634 (D.D.C. 1994) (in which the evidentiary matters regarding the remedial issues were presented during the liability phase of trial primarily by plaintiffs' experts).

297. *See United States v. Microsoft*, 97 F. Supp. 2d 59, 61 (D.D.C. 2000) ("The Court has been presented by plaintiffs with a proposed form of final judgment that would mandate both conduct modification and structural reorganization by the defendant when fully implemented. Microsoft has responded with a motion for summary rejection of structural reorganization and a request for months of additional time to oppose the relief sought in all other respects."), *vacated by* 253 F.3d 34 (D.C. Cir. 2001).

298. *See Parker, supra* note 79, at 1627 (describing how the parties initiate the matters to be decided by the court in the remedial process).

299. *E.g., Microsoft*, 97 F. Supp. 2d at 61 n.1 ("Microsoft's attorneys were promptly able to tender a 35-page 'Offer of Proof,' summarizing in detail the testimony 16 witnesses would give to explain why plaintiffs' proposed remedy, in its entirety, is a bad idea."). The judge might also seek more information from defendants other than those in direct control of the institution. *See Davis v. Watkins*, 384 F. Supp. 1196, 1198 (N.D. Ohio 1974) (cooperation of state governor and attorney general in suit directed at state mental hospital); *Gates v. Collier*, 349 F. Supp. 881, 897 (N.D. Miss. 1972) (conference between court and parties open to interested state and federal officials), *aff'd*, 501 F.2d 1291 (5th Cir. 1974).

300. *See supra* notes 238-43 and accompanying text (discussing procedural requirement that defendants be given the first opportunity to draft remedial plan or remedy the harm); Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 797-99, 803 (1978) (describing the judicial practice of "remedial abstention" by which the court defers

timony about appropriate prophylactic relief by including their industry expertise as to what measures are likely to be successful in avoiding the harm.<sup>301</sup>

The court might then supplement the parties' presentations using commonly-available litigation tools. For example, the court might appoint a special master or a court-appointed expert to investigate the facts, conduct fact-finding hearings, or to interview and consult with those affected by the potential remedial decision.<sup>302</sup> The court might allow intervention or permit amicus briefs to be filed in the case in order to obtain information from interested third parties.<sup>303</sup> Further discovery on the remedial issues

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to the defendants' creation of an injunctive remedy); Parker, *supra* note 79, at 1628 (criticizing the largely deferential stance of courts to defendants' preferences in crafting injunctive relief under which defendants are very likely to win); e.g., United States v. Virginia, 852 F. Supp. 471, 485 (W.D. Va. 1994) (deferring to defendant's proposed remedial plan establishing separate military schools for men and women), *aff'd*, 44 F.3d 1229 (4th Cir. 1995), *rev'd*, 518 U.S. 515 (1996) (holding that remedy violated equal protection).

301. E.g., Madsen v. Women's Health Ctr., 512 U.S. 753, 770 (1997) (supporting prophylactic measure of buffer zone with testimony of one of petitioners' witnesses during evidentiary hearing); People Who Care v. Rockford Bd. of Educ., 111 F.3d 528, 534 (7th Cir. 1997) (acknowledging the utility of expert testimony both at the liability and remedial stage of the lawsuit, but limiting the expert testimony to properly admissible evidence in accordance with *Daubert*); Women Prisoners v. D.C. Dep't of Corrs., 877 F. Supp. 634 (D.D.C. 1994); Fletcher, *supra* note 244, at 657 (stating that the expert provides information regarding the remedial decision by testifying to a consensus among members of his or her particular profession).

302. E.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 8 (1971) (finding defendant's remedial plan unacceptable and appointing educational expert to prepare remedial plan for school desegregation); *People Who Care*, 111 F.3d at 533 (referring remedial phase of school desegregation litigation to magistrate judge pursuant to the parties' consent who then appointed a special master pursuant to FED. R. CIV. P. 53 to hear evidence relevant to the remedy and craft a remedial plan); Hart v. Cmty. Sch. Bd. Of Brooklyn, 383 F. Supp. 769, 769-70 (E.D.N.Y. 1974) (utilizing special master's work and proposed remedial plan in developing court's own injunctive remedy). See *Justice*, *supra* note 9, at 27 (describing the use of special masters to present "the viewpoints about liability and remedy not otherwise likely to be expressed by the participants in the lawsuit"); Fletcher, *supra* note 236, at 656-57 (describing use of special masters, magistrates, and experts in remedial process of institutional injunctions); Special Project, *supra* note 296, at 805-09 (describing use of masters and experts in remedial process and collecting case examples). But see *Women Prisoners*, 93 F.3d at 930 (invalidating the use of a special officer as part of the remedy itself to oversee and investigate future instances of sexual harassment and assault in the women's prison).

303. E.g., Swann, 402 U.S. at 11 (accepting remedial plan submitted by non-party United States Department of Health, Education and Welfare); Fletcher,

could be ordered.<sup>304</sup> The judge might locate relevant remedial precedent from other courts regarding the types of prophylactic measures ordered in similar cases.<sup>305</sup> Alternatively, the judge might view for himself a location or other key aspect of the case.<sup>306</sup>

Once the court has sufficient informational inputs, it must then engage in the remedial decisionmaking process by which it selects and crafts the particular remedy.<sup>307</sup> This remedial process essentially is judicial problem solving through which the court determines the appropriate remedial solution by (1) identifying the interests of the parties, (2) generating and evaluating options, and (3) separating the people from the problem.<sup>308</sup> The court must first separate the people from the problem by remaining impartial and not reacting to the personalities of the parties or himself.<sup>309</sup> Instead, the court bases the remedial solution

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*supra* note 236, at 656-57; *Justice*, *supra* note 9, at 26-27 (describing the judicial use of litigating amici to craft injunctive relief); Special Project, *supra* note 290, at 804; *see, e.g.*, *United States v. Allegheny-Ludlum Indus., Inc.*, 63 F.R.D. 1 (N.D. Ala. 1974); *Chance v. Bd. of Exam'rs*, 330 F. Supp. 203, 207 (S.D.N.Y. 1971); *see also Hart*, 383 F. Supp. at 770 (summarizing the remedial phase of the case in which "the court received communications from various groups and persons affected").

304. *Parker*, *supra* note 79, at 1653 nn.167-70 (collecting cases where judges have ordered additional discovery to determine possible remedial measures).

305. *Cf. Swann*, 402 U.S. at 27 ("The maps submitted in these cases graphically demonstrate that one of the principal tools employed by school planners and by courts to break up the dual school system has been a frank—and sometimes drastic—gerrymandering of school districts and attendance zones."); *United States v. Microsoft Corp*, 97 F. Supp. 2d 59, 63 (D.D.C. 2000) ("The proposed final judgment is represented to the Court as incorporating provisions employed successfully in the past."), *vacated by* 253 F.3d 34 (D.C. Cir. 2001).

306. *See Hart*, 383 F. Supp. at 770 ("With the consent of the parties, the court again viewed Coney Island and its environs.")

307. *See* Special Project, *supra* note 296, at 802 (describing the manner in which judges select appropriate injunctive remedies); *Justice Speech*, *supra* note 14, at 8 ("After almost a year of exhaustively reviewing the trial testimony and the proposed findings of fact submitted by all parties, I ordered comprehensive relief coextensive with the wholesale constitutional violations.")

308. *E.g.*, ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES* 10-12 (1981); Robert MacCrate, *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO BAR 138-40 (1992) (identifying problem solving as the first of ten fundamental skills necessary for competency lawyering); *see generally* Minow, *supra* note 9 (describing Judge Weinstein's role as a problem solver in crafting public law remedies).

309. Where the judge has failed to remain impartial and crafted injunctive relief based on the people in the case, the remedy has been overturned. *United*

on objective criteria such as legal principles, tangible data, evidence, or other resources presented in the record.<sup>310</sup> The court identifies the relevant interests of the parties including practicality, fairness, retribution, or funding readily identifiable from the evidence and briefs presented by the parties.<sup>311</sup> Finally, the court then generates possible remedial options from the suggestions of the parties, experts, evidence, or legal precedent.<sup>312</sup> Then, the court uses traditional decisionmaking tools such as cost-benefit analysis or balancing of the equities of fairness and social justice to select from among the possible alternatives.<sup>313</sup> This routine remedial process for imposing prophylactic remedies conducted within the typical judicial proceedings thus effectuates the norms valued in legitimate judicial decisionmaking: participation, impartiality, and reasoned decisions.<sup>314</sup>

The court does not simply endorse its own preferred moral agenda, but instead designs the prophylactic remedy

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States v. Microsoft Corp., 253 F.3d 34, 110-11, 118-19 (D.C. Cir. 2001) (vacating structural and prophylactic relief ordered based in part on disqualification of judge who based remedy on his own personal animosity towards defendant Microsoft and its CEO, Bill Gates); see *Microsoft*, 97 F. Supp. 2d at 61-62 (implying in rendering remedial decision that defendant failed to use good faith in negotiations or in compliance with liability determination and accusing defendant of being "untrustworthy" and "disingenuous").

310. See, e.g., Special Project, *supra* note 302, at 802.

311. E.g., *id.* at 803; *Microsoft*, 97 F. Supp. 2d at 62-63 (weighing in favor of plaintiffs' remedial proposal: "Plaintiffs won the case, and for that reason alone have some entitlement to a remedy of their choice. Moreover, plaintiffs' proposed final judgment is the collective work product of senior antitrust law enforcement officials of the United States Department of Justice and the Attorneys General of 19 states, in conjunction with multiple consultants. These officials are by reason of office obliged and expected to consider—and to act in—the public interest; Microsoft is not.").

312. E.g., *Hart v. Cmty. Sch. Bd. of Brooklyn*, 383 F. Supp. 769, 770-71 (E.D.N.Y. 1974) (considering three remedial plans submitted by the defendants, the special master, and the plaintiffs' expert); Special Project, *supra* note 302, at 802 ("Judicial selection of the systemic remedy, after receipt of suggestions from all the parties, is a common alternative to judicial imposition of a remedy or judicial non-involvement in remedy formulation. A court seeking the participation of the parties in remedy formulation first solicits their ideas, plans, and supporting information, and then either accepts one suggested plan in toto or devises its own plan out of the several proposals.").

313. FEELEY & RUBIN, *supra* note 9, at 5, 13-17 (describing the decision-making process of the court in prison litigation cases involve identifying a range of alternatives and selecting the best option using a cost-benefit analysis).

314. Sturm, *supra* note 286, at 1435-36; see also Fuller, *supra* note 286, at 365-66, 372.

to conform to the evidence presented at trial and the judicial precedents. Again, as Judge Justice described:

[T]he determination results from the application of judicial precedents and factual reality, which the adversarial process is designed to foster. Simply ordering the Texas prison to hire more prison guards based purely on my personal opinion would have been both an arbitrary and an arrogant use of power. Every aspect of the relief that I ordered was based on the evidence presented in my court.<sup>315</sup>

The prophylactic remedy must be justified through a reasoned decision in which the court supports the particular remedy with evidence in the record. If the judge fails to follow the adjudicatory process and conform the remedy to the factual findings, the injunction is subject to reversal as it was in *Lewis v. Casey*.<sup>316</sup> As the concurring Justices emphasized, the problem with the broad prison library injunction was its "overreaching of the evidentiary record" in ordering relief that was not justified or even supported by the factual findings in the case.<sup>317</sup> Thus, courts are limited to reacting to the legal problem as presented to it and are constrained by the particular application to crafting prophylactic remedies within the confines of that case presentation.<sup>318</sup>

### III. THE NECESSITY OF PROPHYLACTIC REMEDIES

Courts consistently resort to prophylactic remedies because they are necessary to providing effective relief to

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315. Justice Speech, *supra* note 14, at 10.

316. 518 U.S. 343, 359 (1996).

317. *Id.* at 393-94, 397-98 (Souter, J., concurring in part and dissenting in part).

318. Justice Speech, *supra* note 14, at 9 ("Furthermore, even in a so-called public law institutional reform case, the judge is still constrained by certain hallmarks of judicial decisionmaking: (1) the judge must make a decision on every grievance presented; (2) the judge must listen to the witnesses and arguments of both sides; and (3) the judge must justify his decision. These safeguards—which, I emphasize, are not imposed on state legislators and executive officers, who also make decisions profoundly affecting the welfare of the community—make it more likely that a judge's decision regarding the remedy to be imposed will be reliable and well-considered."); cf. Hamilton & Schoenbrod, *supra* note 33, at 487 (explaining that Section 5 remedies are more powerful than typical judicial constitutional remedies because Congress can apply the remedy across the board to others outside the context of the case).

plaintiffs.<sup>319</sup> Other remedies both injunctive and monetary are unable to provide meaningful relief to plaintiffs who have proven a violation of important, but often intangible, rights.<sup>320</sup> The prophylactic remedy fulfills this remedial need by providing a judicial mechanism to address the definitional and functional inadequacies of other remedies.

Yet the construct of prophylaxis that continues to dominate legal thinking is that of a remedy that gives plaintiff more than she needs or deserves thereby "overprotecting" legal rights.<sup>321</sup> While Professor Schoenbrod explained twenty years ago how prophylaxis does not in fact give something extra,<sup>322</sup> but rather gives the plaintiff precisely what she is entitled to by extra measures, the question persists as to the real necessity for prophylactic relief. For example, in the *Prison Litigation Reform Act*, targeted attacks on structural and prophylactic relief intended to eliminate the use of prophylactic remedies by requiring that any prospective relief imposed by a federal court be "necessary" to correcting a constitutional violation.<sup>323</sup> The implication is that prophylactic relief is not necessary to vindicate legal rights.

As previously discussed, however, prophylactic remedies are important—and indeed integral—to interpreting and implementing legal rights.<sup>324</sup> The prophylactic remedy uniquely is able to translate abstract rights into meaningful relief.<sup>325</sup> Its measures exemplify the right, thereby defining

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319. Monaghan, *supra* note 15, at 21; Landsberg, *supra* note 2, at 965; Justice, *supra* note 9, at 9.

320. Alternative injunctive remedies are often ineffective because they are vague or avoidable. Damages are ineffective because the loss of intangible rights is difficult to measure in monetary terms, *see Carey v. Piphus*, 435 U.S. 247 (1978), or difficult to collect from immune state defendants, *see* U.S. CONST. amend. XI.

321. *See supra* note 123, accompanying text, and sources cited. The notion of prophylaxis as overprotecting legal rights was first put forth by Henry Monaghan who advocated in favor of such rules and remedies. *See* Monaghan, *supra* note 15, at 21 ("A prophylactic rule might be constitutionally compelled when it is necessary to overprotect a constitutional right because a narrow, theoretically more discriminating rule may not work in practice.").

322. *See* Schoenbrod, *supra* note 5, at 671; *see also supra* note 136 and accompanying text.

323. 18 U.S.C. § 3626(a)(1)(A) (2000).

324. *See supra* notes 84-89 and accompanying text.

325. Levinson, *supra* note 71, at 874 ("The definition of most or all rights incorporates 'remedial' prophylactic rules."); Thomas, *Remedial Rights*, *supra* note 33, at 692 (explaining that "[prophylactic] remedies are used by courts to



the right in a way that allows it to become cognitively tangible. In addition, the prophylactic remedy has the capacity to effectively implement the right through the use of its specific directives.<sup>326</sup> The unique functional abilities of the prophylactic remedy to counter the defendant's resistance to compliance, provide precise notice to the defendant of expected conduct, and facilitate the court's oversight make it a particularly effective choice to enforce intangible rights.<sup>327</sup>

### A. Definitional Need to Translate Abstract Rights

The unique capability of the prophylactic remedy to translate abstract rights into tangible meaning is perhaps its greatest asset.<sup>328</sup> The intangible rights at issue in the prophylactic remedies cases present challenges to the court as to how to translate those rights into tangible meaning.<sup>329</sup> These cases all involve issues of paramount importance due to the priority of the attendant right, the nature of public law litigation, or the threat to personal liberty.<sup>330</sup> Yet the vagueness of traditional injunctive remedies prevents the court from conveying to the parties a tangible reality of the operative right.

For example, traditional equitable remedies for race discrimination might order the defendant to "stop discriminating," or to "not discriminate against the plaintiff in the future."<sup>331</sup> These commands are too vague even for the well-

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provide a tangible and workable definition to the otherwise amorphous constitutional proscription . . .").

326. See *infra* Part III.B.

327. See *id.*

328. Cf. Thomas, *Remedial Rights*, *supra* note 33, at 687-95 (describing how remedies generally are unified with the right so that the remedies define the meaning of the substantive guarantee); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L. J. 585, 587 (1983) (stating that remedies generally "give meaning to ideals" in order that they "be effective in the real world").

329. *Justice*, *supra* note 9, at 1 ("The values that we find in our Constitution . . . are ambiguous. They are capable of a great number of different meanings. . . . There is a need—a constitutional need—to give them specific meaning, to give them operational content . . .").

330. See Thomas, *Prophylactic Remedies*, *supra* note 1, at 389-90.

331. See, e.g., *Burton v. City of Belle Glade*, 178 F.3d 1175, 1202 (11th Cir. 1999) (denying as too broad appellants' request for an injunction to stop discriminating on the basis of race in all its annexation decisions); *Payne v. Travenol Labs., Inc.*, 565 F.2d 895, 897 (5th Cir. 1978) (reversing on specificity grounds the District Court's injunction, which prohibited defendants from discriminating on the basis of color, race, or sex in employment practices).

intentioned defendant—what does it mean to stop discriminating? What must the defendant do or not do?<sup>332</sup> For example, in *Hughey v. JMS Development Corp.*,<sup>333</sup> the trial court's injunction stated: "[Defendant shall] not discharge stormwater into the waters of the United States from its development property . . . if such discharge would be in violation of the Clean Water Act."<sup>334</sup> The appellate court vacated the injunction due to the inability of it or the defendant to determine what the injunction meant: "Was JMS supposed to stop the rain from falling? Was JMS to build a retention pond to slow and control discharges? Should JMS have constructed a treatment plan to comply with the requirements of the CWA?"<sup>335</sup> Indeed, courts routinely invalidate such broad "obey the law" injunctions that fail to provide the defendant with a clear directive.<sup>336</sup> And defendants often ig-

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332. *CF & I Steel Corp. v. United Mine Workers of Am.*, 507 F.2d 170 (10th Cir. 1974) (holding that injunctive decree is vague when the delineation of the proscribed activity lacks particularity, or when it contains only an abstract conclusion of law rather than an operative command capable of enforcement); see *Parker, supra* note 18, at 514 (1999) ("Knowing that the Fourteenth Amendment prohibits states from establishing 'separate but equal' schools based on race tells us little about the nature of the right. What does it mean to be free from racial discrimination in public schools? Do children have a right to attend an integrated school; or a more limited right to attend an integrated school to the extent feasible using the students within the school district lines; or an even more limited right to attend schools with race-neutral attendance zones? In addition, does the right include anything other than student assignment?") (citation omitted). See also *Justice Speech, supra* note 14, at 7 ("If a decree is only in general terms, such a defendant will find it easy to disobey and defy the decree without fear of contempt, by making the contention that the order is too vague to guide future conduct.").

333. 78 F.3d 1523 (11th Cir. 1996).

334. *Id.* at 1524.

335. *Id.* at 1531.

336. *LAYCOCK, supra* note 4, at 236; *JAMES M. FISCHER, UNDERSTANDING REMEDIES* 290 (1999). *E.g.*, *Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health and Rehab Servs.*, 225 F.3d 1208, 1223 (11th Cir. 2000) ("The preliminary injunction in this case differs little from an 'obey the law' order because it fails to identify with adequate detail and precision how Defendants are to perform such critical obligations as 'adequately reimbursing providers of care' and 'complying with the substantive requirements of the Medicaid Act.'"); *Burton*, 178 F.3d at 1201 (dismissing plaintiff's discrimination claim because of lack of any remedy to redress harm because the injunction sought by appellants "would do no more than instruct the City to 'obey the law'"); *Keyes v. Sch. Dist. No. 1*, 895 F.2d 659, 668 n.5 (10th Cir. 1990) (invalidating as vague a provision of an injunction in school desegregation cases stating: "The duty imposed by the law and by this interim decree is the desegregation of schools and the maintenance of that condition. The defendants are directed to use their expertise and

nore such commands and continue to do business as usual.<sup>337</sup> Legalistic guarantees against "discrimination," "pollution," or "unconstitutional action," standing alone are abstract in meaning.

Prophylactic measures correct this void by translating the abstract right by exemplification.<sup>338</sup> The tangible measures of prophylaxis exemplify the meaning of the right in the specific case context.<sup>339</sup> Explanation by example is a common way to understand a concept by illustrating its meaning rather than using a synonym, antonym or description. For example, the meaning of "hot" could be illustrated by the examples of a fire, stove,<sup>340</sup> or chili pepper<sup>341</sup> rather than describing it as the "opposite of cold" or "capable of burning" or "giving off heat."<sup>342</sup> Similarly, prophylactic measures provide tangible illustrations of the meaning of

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resources to comply with the constitutional requirement of equal education opportunity for all who are entitled to the benefits of public education in Denver, Colorado."); *Payne v. Travenol Labs., Inc.*, 565 F.2d 895, 898 (5th Cir. 1978) (refusing to enforce injunction that prohibited "discrimination"); *see also* *Schine Chain Theaters, Inc. v. United States*, 334 U.S. 10, 125-26 (1948) (overturning injunction prohibiting monopolization). *But see* *Ennels v. Ala. Inns Assocs.*, 581 F.Supp. 708, 709-10 (M.D. Ala. 1984) (affirming injunction prohibiting defendant's "discrimination in admitting or serving blacks" rather than requiring the enumeration of specific practices because of "[m]an's ingenuity in devising methods to discriminate 'in offering or serving' black patrons is infinite.").

337. *See Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976) (explaining defendant school board's argument in motion for contempt that its inaction was due to the fact that it never understood what the injunction meant prohibiting "no majority of any minority" schools).

338. Levinson, *supra* note 71, at 885 ("[T]he definition of a right may effectively incorporate a remedy, most commonly the equivalent of a prophylactic, preventive injunction.").

339. *See Justice*, *supra* note 9, at 50 ("The Constitution does not say anything about reports, showers, or isolation cells; much less does it say anything about the date reports are due, the temperature of showers, or the maximum number of days that can be spent in an isolation cell. But it does say something about equality and humane treatment, and a court trying to give meaning to those values may find it both necessary and appropriate—as a way of bringing the organization within the bounds of the Constitution—to issue directives on these matters.").

340. *See* definitions of "hot," available at <http://www.dictionary.com> (citing WEBSTER'S REVISED UNABRIDGED DICTIONARY (1998)); WordNet 1.6, Princeton University (1997)) (last visited Apr. 13, 2004).

341. *See id.* (citing THE AMERICAN HERITAGE DICTIONARY, *supra* note 41, available at <http://www.bartleby.com>).

342. *Id.*

the abstract right.<sup>343</sup> For example, to describe what it means to not "discriminate" in the workplace, the court might choose a synonym prohibiting a "hostile environment," an antonym requiring "equal opportunity" or a contextual description of prohibiting discrimination "in the hiring and promotion of employees."<sup>344</sup> Alternatively, the court might illustrate the right to be free of gender discrimination by example through prophylactic measures directing anti-harassment policies, pornography-free workspace, and education of employees. In this way, the prophylactic remedy exemplifies the legal guarantee, clearly and comprehensively conveying the content of the right.

Prophylaxis translates rights, but does not itself transubstantiate into an independent right.<sup>345</sup> The prophylactic remedy does not convert the measure into a new right.<sup>346</sup> However, prophylaxis is commonly misperceived as the judicial creation of a new right.<sup>347</sup> This "remedial incorporation," by which the remedy seems to become a part of the right, is prevalent with prophylactic remedies.<sup>348</sup> The specificity of prophylactic measures provides a tangible measure to grasp when trying to effectuate the legal guarantees in real life, and thus often the remedy takes on the mirage of its own right.<sup>349</sup> For example, in the prison context the prophylactic measure of a law library to facilitate the right of prisoner access to the courts seemed to evolve into a right in

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343. *E.g.*, *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Women Prisoners v. D.C. Dep't of Corrs.*, 877 F. Supp. 634 (D.D.C. 1994).

344. *E.g.*, *Burton v. City of Belle Glade*, 178 F.3d 1175 (11th Cir. 1999); *Payne v. Travenol Labs., Inc.*, 565 F.2d 895 (5th Cir. 1978).

345. *Contra* Levinson, *supra* note 71, at 857.

346. Thomas, *Prophylactic Remedies*, *supra* note 1, at 381-84. *Cf.* *New York v. Quarles*, 467 U.S. 649, 654 (1984) (declaring that *Miranda's* prophylactic measures "are not themselves rights protected by the Constitution . . .") (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)).

347. Thomas, *Prophylactic Remedies*, *supra* note 1, at 362; Grano, *supra* note 7, at 101-06 ("What distinguishes a prophylactic rule from a true constitutional rule is the possibility of violating the former without actually violating the Constitution. A decision that promulgates or employs a prophylactic rule will not attempt to demonstrate an actual violation of the defendant's constitutional rights under review."); Klein, *supra* note 22, at 1032 (defining "prophylactic rule" as a legal requirement that "may be triggered by less than a showing that the explicit rule was violated . . .").

348. Levinson, *supra* note 71, at 899-904 ("[R]emedial incorporation means defining a constitutional right prophylactically to forbid at least some laws or policies that would be permissible if considered in isolation.").

349. Thomas, *Prophylactic Remedies*, *supra* note 1, at 382-83.

itself.<sup>350</sup> Similarly, in the right to counsel context, the *Anders* brief process for withdrawing from representation became a new right in practice.<sup>351</sup> And in the desegregation context, prophylactic measures addressing housing segregation seemed to transubstantiate into the right against *de facto* segregation.<sup>352</sup>

However, the courts have strictly blocked this definitional expansion of the substantive guarantee. In *Lewis v. Casey*, the Court struck down structural and prophylactic relief redressing inadequacies in the prison law library because there was no right to a library *per se*.<sup>353</sup> Instead, the library was merely a prophylactic measure designed in the prior case of *Bounds v. Smith* to ensure the plaintiffs' rights of access to the court.<sup>354</sup> Similarly, in *Smith v. Robbins*, the Court went to great lengths to explain that the *Anders* procedure is simply a prophylactic process to protect against the denial of counsel and not a right itself.<sup>355</sup> Thus, a plaintiff could not sue for the failure to comply with the *Anders* procedure, and the State of California could create substitute measures to protect the right to counsel.<sup>356</sup> In the desegregation cases, the Court repeatedly has affirmed that the equal protection right itself extends only to *de jure* seg-

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350. *Id.* at 385 (discussing phenomenon of remedial incorporation in prison library cases). Compare *Bounds v. Smith*, 430 U.S. 817 (1977) (imposing prophylactic measure of prison law library) with *Lewis v. Casey*, 518 U.S. 343, 348-49, 351 (1996) (rejecting as insufficient a cause of action based on failure to provide adequate law library). See also Levinson, *supra* note 71, at 878-82 (discussing remedial incorporation generally in prison condition cases).

351. Thomas, *Prophylactic Remedies*, *supra* note 1, at 385 (discussing remedial incorporation in context of withdrawal of counsel). Compare *Anders v. California*, 386 U.S. 738 (1967) (requiring counsel to prepare brief advising court of lack of merit of appeal before withdrawing from case in order to prevent harm from denial of counsel) with *Smith v. Robbins*, 528 U.S. 259 (2000) (holding that *Anders* procedure is not required right itself).

352. Levinson, *supra* note 71, at 874-77 (describing how the remedies in school desegregation cases seemed to redefine the right from prohibition of *de jure* segregation to prohibition of *de facto* segregation).

353. 518 U.S. at 351 (1996) ("Because *Bounds* did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance is subpar in some theoretical sense.").

354. *Id.*

355. *Smith*, 528 U.S. at 273.

356. *Id.* at 265, 272-74, 286-88.

regation.<sup>357</sup> Prophylactic remedies may redress *de jure* segregation by reaching the *de facto* contributors of that harm, but they may not address *de facto* segregation in the absence of a constitutional violation.<sup>358</sup>

The import of these cases is clear: prophylactic remedies are not rights. This means first, that plaintiffs may not base their lawsuit on the violation of the prophylaxis.<sup>359</sup> Litigants may not sue for the mere denial or inadequacy of a prophylactic measure itself.<sup>360</sup> Only the plaintiffs in the original case may sue for contempt if a defendant fails to comply with ordered prophylactic measures.<sup>361</sup> Plaintiffs in external actions must base their cause of action on the attendant constitutional, statutory, or common law right.<sup>362</sup> While prophylactic remedies help explain the attendant right, they do not function as an independent right themselves.

Prophylactic remedies have served as interpretative shorthand for finding a legal violation in subsequent cases.<sup>363</sup> While some have viewed this as evidence of prophylaxis converting to a right,<sup>364</sup> its shorthand use is merely the result of the regular operation of legal precedent in subsequent cases.<sup>365</sup> Courts utilize the remedial decision with respect to prophylaxis to inform their decisions on liability and remedies in subsequent, unrelated cases. For example, if X, Y, and Z have been adopted as prophylactic measures to remedy a constitutional violation in other cases, then the

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357. *E.g.*, *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464-65 (1979); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977).

358. *See, e.g.*, *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Dayton Bd. of Educ. v. Brinkman* 433 U.S. 406 (1977); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Pasadena Bd. of Educ. v. Spangler*, 427 U.S. 424, 435 (1976).

359. Thomas, *Prophylactic Remedies*, *supra* note 1, at 383.

360. *See, e.g.*, *Smith*, 528 U.S. at 265; *Lewis v. Casey*, 518 U.S. 343, 351 (1996). *Cf.* *Alexander v. Sandoval*, 532 U.S. 275, 288-89 (2001) (denying claim brought for failure to comply with administrative agency's prophylactic measure rather than for discrimination).

361. The prophylactic remedy as a type of injunctive relief acts *in personam* upon the defendant and requires compliance under threat of contempt. *SHOBEN & TABB*, *supra* note 1, at 246; *LAYCOCK*, *supra* note 4, at 237-38.

362. *E.g.*, *Lewis*, 518 U.S. at 350-52.

363. Thomas, *Prophylactic Remedies*, *supra* note 1, at 382.

364. *See* Klein, *supra* note 22, 1035-37.

365. Thomas, *Prophylactic Remedies*, *supra* note 1, at 382-83 (explaining in depth how prophylactic remedies operate as precedent in subsequent cases).

absence of those actions by a defendant may suggest inferentially that harm was not prevented, *i.e.* that a violation occurred.<sup>366</sup> Conversely, the prophylactic remedy may operate as a safe harbor for defendants in subsequent, unrelated cases, allowing them to demonstrate their good faith or lack of contribution to the violation of law.<sup>367</sup> This is because showing that an alleged wrongdoer took measures known to avoid harm suggests circumstantially that it is not at fault for any resulting harm.<sup>368</sup> Thus, prophylactic remedies are useful legal precedent to decide similar cases in the future. However, the line of precedential use is crossed when litigants assert a right to the prophylaxis itself.

The conclusion that prophylaxis is not a right itself evaporates decades of misguided criticism of prophylactic relief.<sup>369</sup> Courts are not creating new rights through prophylaxis, but rather, are interpreting the legal right by example. The courts are choosing the remedial measures necessary to translate the abstract rights into accessible and practical meaning. The practical meaning conveyed by orders directing defendants' conduct falls within the common, accepted power of the court to interpret legal rights and craft equitable relief.<sup>370</sup> Therefore, as the emerging consen-

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366. Thus, prophylactic remedies entered in a case sometimes serve as detection standards for violations in subsequent cases. *See id.* at 383, 386; Caminker, *supra* note 15, at 1-2; Klein, *supra* note 22, at 1037.

367. Klein, *supra* note 22, at 1033, 1044 ("[A] '... safe harbor rule' is a judicially created procedure, that if properly followed by the government actor, insulates the government from argument that the constitutional right was violated."). *E.g.*, *Kolstad v. Am. Dental Assoc.*, 527 U.S. 526, 528 (1999) (establishing a safe harbor for employers against imposition of punitive damages for sexual harassment through compliance with prophylactic measures of adoption of anti-harassment policies).

368. *E.g.*, *Kolstad*, 527 U.S. at 528; *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (identifying affirmative defense for defendant employer who promulgates anti-harassment policy and complaint procedure as demonstrating reasonable care to prevent sexual harassment).

369. Thomas, *Prophylactic Remedies*, *supra* note 1, at 382.

370. *See id.* at 376-82 (exploring the judicial remedial power to impose prophylactic remedies); Strauss, *supra* note 15, at 204-08 (explaining the legitimacy of prophylaxis as just one type of ubiquitous interpretive rule); Caminker, *supra* note 15, at 2, 7, 22 (arguing prophylaxis is "straightforward exercise of [legitimate] judicial power to interpret" rights). *Cf.* Monaghan, *supra* note 15, at 2-3, 21-23 (grounding the legitimacy of judicial prophylaxis in the court's "constitutional common law" authority to impose implementing rules of "substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions").

sus seems to acknowledge, there is nothing shocking or even questionable about the use of prophylactic relief.<sup>371</sup>

### B. Functional Need to Implement Rights

Prophylactic remedies are also needed to ensure the implementation of the right.<sup>372</sup> All remedies function instrumentally to implement the descriptive right.<sup>373</sup> Yet prophylactic remedies particularly help address hurdles to effective implementation caused by general orders that facilitate confusion and resistance by defendants.<sup>374</sup> Prophylactic relief counters the lack of compliance with an adjudicated right and its instrumental remedy by (1) avoiding the defendants' resistance to the right by mandating specific change, (2) providing clear notice to the defendants of expected behavior, and (3) ensuring the practical enforcement of the order by the court.<sup>375</sup>

As Professor Gewirtz explained twenty years ago in his classic piece, *Remedies and Resistance*, specific remedial decrees permit the court to address the defendants' resistance on both philosophical and practical levels.<sup>376</sup> The specific measures eliminate the defendants' discretion to avoid the practical change necessary to implement the right, thereby ensuring a higher level of remedial effectiveness.<sup>377</sup> Gewirtz

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371. See Thomas, *Prophylactic Remedies*, *supra* note 1, at 363-70; Caminker, *supra* note 15, at 25; Dorf & Friedman, *supra* note 15, at 73 n.47; Landsberg, *supra* note 2, at 976.

372. SCHOENBROD, *supra* note 4, at 679; *Justice*, *supra* note 9, at 1-2; Fallon, *supra* note 22, at 137-39.

373. LAYCOCK, *supra* note 4, at 1; Gewirtz, *supra* note 328, at 587 ("The function of a remedy is to 'realize' a legal norm, to make it a 'living truth.'"). See generally Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 57 (1997) ("A crucial mission of the court is to *implement* the Constitution successfully. . . . The Court's role in implementing the Constitution . . . is the central focus of this forward.").

374. Monaghan, *supra* note 15, at 21 (arguing that prophylaxis might be required where "there is a substantial danger that a more finely tuned rule may be subverted in its administration by unsympathetic courts, juries, or public officials.").

375. See Schoenbrod, *supra* note 5, at 679 (awarding prophylactic relief is necessary to ensure the effective enforcement of the right by the court and to achieve compliance from resistant defendants who could take advantage of the uncertainty in more general orders).

376. Gewirtz, *supra* note 328, at 587.

377. *Id.*



demonstrated his point using the desegregation cases.<sup>378</sup> In some cases, the school defendants resisted the declared right to be free from segregation.<sup>379</sup> By imposing specific relief, the courts countered this resistance to the right by mandating specific action rather than requiring defendants to act against a strong philosophical disbelief.<sup>380</sup> In other cases, the defendants' resistance was to the practical externalities of the remedy such as the imposition of financial costs or assumption of unpopular social obligations like student busing.<sup>381</sup> The specificity of prophylactic measures

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378. *Id.* at 587-88, 609 (addressing the problem of white resistance to desegregation evidenced by white flight from public schools, violence, boycotts, hostility, and foot-dragging).

379. *Id.* at 588 (describing the relentless and persistent failure of defendants to accept change and act in good faith); *id.* at 593 n.16 ("Criticism of a remedy, therefore, may reflect criticism of the underlying right."); Frank Easterbrook, *The Limits of Judicial Power in Ordering Remedies: Civil Rights and Remedies*, 14 HARV. J.L. & PUB. POL'Y 103, 103 (1991) ("When we hear an objection to the remedy, it is almost always a disguised objection to the definition of what is due, and not to the methods used to apply the balm."); see also *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 13 (1971) (describing the sixteen years of deliberate resistance and lack of good faith implementation of Court's mandate in *Brown* to end segregation).

380. Justice Speech, *supra* note 14, at 9 ("*Morales* illustrates an old adage: If you are confronted with a refractory mule, in order to get its attention, you need to hit it—hard—right between the eyes. In *Morales*, the recalcitrant state institution was stimulated to action by the attention-getting, detailed, remedial order."); *id.* at 9-10 (describing prophylactic relief issued in *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980): "I ordered relief which has been justly described as 'more comprehensive and specific than any other prison order ever issued by a federal court.' The relief included details as specific as the amount of exercise to be permitted to inmates, the number of guards assigned to a unit, and the space allowance for prisoners housed in dormitories. The specificity to the order resulted from the truly active and fanatical opposition of the defendants in the pre-trial, trial, and post-trial phases of the case.").

381. See Gewirtz, *supra* note 328, at 599-601; e.g., *Swann*, 402 U.S. at 15-29; *DeRolph v. State*, 780 N.E.2d 529 (Ohio 2002) (*DeRolph IV*) (defendant resisting order to fix and "overhaul" state system of funding public education on grounds of lack of funds and aversion to raising taxes). The Ohio Supreme Court's failure to impose prophylactic remedies in the school funding case, *DeRolph IV*, demonstrates the defendants' ability to evade compliance when they fail to accept the legitimacy of the adjudicated right or the ordered remedy. In *DeRolph I* in 1997, the Supreme Court declared the state's funding system for public education unconstitutional under the Ohio Constitution's guarantee of a thorough and efficient education and ordered a total "overhaul" of the system. 677 N.E.2d 733 (Ohio 1997). Yet the state took no action to change the funding system. It repeatedly appealed to the Court on philosophical and practical reasons (lack of funds), and each time the Court reaffirmed its holding. *DeRolph v. State (DeRolph II)*, 678 N.E.2d 886 (1997); *DeRolph v. State (DeRolph III)*, 754

transfers the onus of the remedial obligations from the defendants to the court, thereby deflecting the political fallout from unpopular change.<sup>382</sup> Thus by the time of *Swann v. Charlotte-Mecklenburg Board of Education*, the Court recognized that its general commands of eliminating segregation were ineffective at preventing unconstitutional treatment.<sup>383</sup> It therefore adopted in *Swann* prophylactic measures of busing, ratios, and gerrymandered attendance zones proactively to counter the defendants' resistance to the theory and practice of constitutionally-required desegregation.<sup>384</sup>

Federal judge William Justice similarly described his rationale for imposing prophylactic relief in institutional cases to counter the defendants' resistance:

[I]t should be emphasized that when confronted with an obstinate, obdurate and unregenerate defendant, a more detailed remedy is needed. If a decree is only in general terms, such a defendant will find it easy to disobey and defy the decree without fear of contempt, by making the contention that the order is too vague to guide future conduct. In such instances, a court must "ratchet-down" on the defendant, by successive, more detailed supplemental decrees, until compliance is eventually achieved. Therefore, I firmly believe that when a defendant exhibits a stubborn and perverse resistance to change,<sup>385</sup> extensive court-ordered relief is both necessary and proper.

The same need for assurances of effectiveness against the defendants' resistance can be found in the abortion protest cases of the mid-1990s.<sup>386</sup> In those cases, the defendant

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N.E.2d 1184 (2001); *DeRolph IV*, 780 N.E.2d 529. However, the Court never imposed specific prophylactic measures nor imposed contempt penalties to counter the defendants' resistance. Instead, a worn-down, and differently constituted Supreme Court finally issued a writ of prohibition freezing all relief in the case. See *State v. Lewis*, 789 N.E.2d 195 (Ohio 2003).

382. *E.g.*, *Swann*, 402 U.S. at 15-29; *Missouri v. Jenkins*, 495 U.S. 33, 51-52 (1990) (upholding order to enjoin state tax collection authorities from denying adequate budget to school district needed to remedy segregation). Indeed in *Missouri v. Jenkins*, the school defendant itself became essentially a plaintiff seeking to garner the court's power to effectuate change that the school itself admitted was required, but was blocked by financial, social, and political opposition. See, *e.g.*, *Parker*, *supra* note 18, at 487-88, 495.

383. See *Swann*, 402 U.S. at 15-29.

384. See *id.* at 22-30.

385. Justice Speech, *supra* note 14, at 7.

386. See *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994).

protestors resisted the rights of the plaintiffs to choose abortions and resisted court orders to stop blocking those abortions.<sup>387</sup> Indeed, in both cases, the court had documentation of the defendants' resistance.<sup>388</sup> In *Madsen v. Women's Health Center*, the protestors had repeatedly disobeyed a prior injunction issued by the judge prohibiting them from "blockading and denying access to the clinic."<sup>389</sup> In *Schenck*, the abortion protestors had violated a temporary restraining order prohibiting their blockading, and had engaged in similar illegal behavior at other times, thereby demonstrating their propensity to violate a general preventive order.<sup>390</sup> The specific, objective measures gave the defendants in both cases less room for avoidance with the declared right of the plaintiffs and thus facilitated the greatest possible level of effectiveness of the court's order.<sup>391</sup>

At a second level, prophylactic relief ensures the practical enforcement of the right by providing the defendant with clear notice of expected behavior.<sup>392</sup> For example, by specifying that prohibiting discrimination means establishing corporate anti-discrimination policies, procedures, and training, the court avoids confusion and uncertainty on the part of defendants.<sup>393</sup> The certainty gives defendants the

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387. See *Schenck*, 519 U.S. at 365; *Madsen*, 512 U.S. at 758.

388. See *Schenck*, 519 U.S. 365-66; *Madsen*, 512 U.S. at 758. Similarly, in *Hutto v. Finney*, 437 U.S. 678 (1978), the Court similarly supported the validity of the prophylactic remedy on the basis of the need to counter the prison defendants' "long and unhappy history" of unconstitutional prison conditions. *Id.* at 687. The unconstitutional conditions in the Arkansas prison system characterized by the district court as "a dark and evil world completely alien to the free world" had persisted for decades. *Id.* In the specific litigation phase in *Hutto* itself, the conditions found to be unconstitutional remained uncured for at least three years. See *id.* at 684.

389. See *Madsen*, 512 U.S. at 758.

390. See *Schenck*, 519 U.S. at 365, 368, 380.

391. See Gewirtz, *supra* note 328, at 596 (explaining that while no remedial methods can guarantee success, a judge can reduce the risk of ineffectiveness by imposing prophylactic measures such as monitoring compliance, issuing specific decrees, and requiring specific procedures and programs).

392. *Justice*, *supra* note 9, at 50 ("[W]hen specificity is present, it can usually be traced to considerations of efficacy and sometimes to general considerations of fairness (such as notice).").

393. *Id.* ("The court may also find it necessary and appropriate to be quite specific in these directives, either as a way of minimizing the risk of evasion or as a way of helping the bureaucratic officers know what is expected of them."); Cf. *Int'l. Longshoremen's Ass'n v. Phila. Marine Trade Ass'n*, 389 U.S. 64, 76 (1967) ("We do not deal here with a violation of a court order by one who fully understands its meaning but chooses to ignore its mandate. We deal instead

freedom to continue their routine business practices without inhibition or fear that such conduct might violate an existing injunction.<sup>394</sup> Moreover, the certainty of prophylactic measures protects defendants against exposure to contempt punishment for violating a vague or confusing order.<sup>395</sup> This advantage provided by the prophylactic remedy of certainty is in fact a requirement of valid injunctive relief.<sup>396</sup> Federal Rule of Civil Procedure 65 and the corresponding common law rules mandate the protection of defendants' rights by specific injunctions.<sup>397</sup> The courts emphasize that specific injunctions are required to provide defendants with information as to what is required so as to

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with acts alleged to violate a decree that can only be described as unintelligible. The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension. Reversed."); *Meyer v. Brown & Root Const. Co.*, 661 F.2d 369, 373 (5th Cir. 1981). ("An injunction must simply be framed so that those enjoined will know what conduct the court has prohibited.") (quoting *Int'l. Longshoremen's Ass'n*, 389 U.S. at 76).

394. *See Public Serv. Co. of N.H. v. Patch*, 167 F.3d 15, 29 (1st Cir. 1998) ("The Commission claims that it is unsure what is and is not permissible, and it implies that this uncertainty inhibits its ability to carry out its ordinary rate-regulation responsibilities vis-a-vis the utilities—responsibilities that certainly continue at the present time."); cf. *Russell C. House Transfer & Stor. Co. v. United States*, 189 F.2d 349 (5th Cir. 1951) (holding that "no decree should be so broad as to place the entire conduct of one's business under jeopardy of punishment for contempt for violating a general injunction").

395. *See Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 439 (1976) ("Because of the rightly serious view courts have traditionally taken of violations of injunctive orders, and because of the severity of punishment which may be imposed for such violation, such orders must in compliance with Rule 65 be specific and reasonably detailed.").

396. *Fla. Ass'n of Rehabilitation Facilities, Inc. v. Fla. Dep't of Health and Rehabilitative Servs.*, 225 F.3d at 1223 (11th Cir. 2000) ("An injunction must be framed so that those enjoined know exactly what conduct the court has prohibited and what steps they must take to conform their conduct to the law.").

397. *FED. R. CIV. P. 65(d)* ("Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained."); *See Fla. Ass'n*, 225 F.3d at 1223 ("The specificity requirement of Rule 65(d) is no mere technicality; '[the] command of specificity is a reflection of the seriousness of the consequences which may flow from a violation of an injunctive order.'"); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1200 (11th Cir. 1999) ("This specificity requirement is necessary 'to protect those who are enjoined 'by informing them of what they are called upon to do or to refrain from doing in order to comply with the injunction or restraining order.'" (quoting *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1531 (11th Cir. 1996); accord *Payne v. Travenol Labs., Inc.*, 565 F.2d 895, 897 (5th Cir. 1978).

avoid the serious consequences of contempt.<sup>398</sup> Prophylactic remedies thus protect defendants' rights while also facilitating compliance with needed relief.

Finally, the specificity of the prophylactic measures enables the practical enforcement of the injunction against the defendant.<sup>399</sup> For example, a prophylactic remedy requiring defendants to stay 30 or 36 feet away from clinic property builds in ease of enforcement as contrasted with a more general order prohibiting "blockading" access to the property.<sup>400</sup> The court does not have to determine on a motion for contempt whether the defendant blocked access to the clinic or obstructed a patient's right to privacy, but simply whether the defendant was 34 or 38 feet away from the clinic. And the police on the front lines of enforcement can implement the order using the hard objective criteria of number of feet rather than the soft subjective meaning of "blockading." Prophylaxis thus provides needed objectivity to the amorphous areas of intangible rights and equitable relief that allows courts to hold defendants accountable.

### CONCLUSION

This Article has attempted to demystify the prophylactic remedy. Its goal has been to demonstrate the principled foundation of prophylactic relief in order to dispel the working assumption of prophylaxis as illegitimate judicial

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398. See *Spangler*, 427 U.S. at 438-39; *Payne*, 565 F.2d at 897 ("This command of specificity is a reflection of the seriousness of the consequences which may flow from a violation of an injunctive order."); *Ala. Nursing Home Ass'n v. Harris*, 617 F.2d 385, 387-88 (5th Cir. 1980) ("This requirement of specificity, based in part on notions of basic fairness, ensures that individuals against whom an injunction is directed receive explicit notice of the precise conduct that is outlawed."). As explained in Wright & Miller's treatise of civil procedure: Rule 65 serves to "protect those who are enjoined by informing them of what they are called upon to do or to refrain from doing in order to comply with the injunction or restraining order. As a result, one of the principal abuses of the pre-federal rules practice—the entry of injunctions that were so vague that defendant was at a loss to determine what he had been restrained from doing—is avoided. The drafting standard established by Rule 65(d) is that an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed." 11A WRIGHT, MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CIVIL PROCEDURE* 2d § 2955 (1995) (footnotes omitted).

399. See Schoenbrod, *supra* note 5, at 679.

400. See, e.g., *Schenck v. Pro-Choice Network*, 519 U.S. 357, 380 (1997); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 772-73 (1994).

activism. The term “prophylactic” has become a legal term of art comprised of precise meaning and power. This meaning is assumed to be part of the common knowledge of the lawyer, and indeed, the concept of prophylaxis has become, perhaps unwittingly, deeply engrained in our jurisprudence. By fleshing out the theoretical and doctrinal basis for the remedy, this Article has hoped to advance the continued and appropriate use of this powerful equitable remedy.

